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IN THE

Supreme Court of the United States

SANDRA FERGUSON,

Petitioner,

v.

ERIC HOLDER,

ATTORNEY GENERAL OF THE UNITED STATES.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed a provision of the Immigration and Nationality Act that previously had allowed the Attorney General to waive deportation for immigrants convicted of certain otherwise deportable offenses. In *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court held, as a matter of statutory construction, that Congress did not intend for Section 304(b)'s repeal to have retroactive effect. The questions presented are:

1. Whether this Court's construction of IIRIRA Section 304(b) as not applicable to pre-enactment convictions applies to all immigrants whose convictions predate IIRIRA's enactment, as the Third and Eighth Circuits have held, or whether Section 304(b)'s retroactivity instead (a) turns on an immigrant's subjective reliance, as the Eleventh Circuit here and two other courts of appeals have held; (b) turns on objectively reasonable reliance, as one court of appeals has held; or (c) is categorically inapplicable to convictions obtained at trial, as four circuits have held.

2. Whether the long-established presumption against retroactivity applies only when individuals can establish either subjective or objective reliance on prior law.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT 1
REASONS FOR GRANTING THE WRIT 5
I. The Courts Of Appeals Have Splintered Over The Retroactivity Of IIRIRA's Repeal Of The Attorney General's Waiver Authority Under Section 212(c) 7
A. Five Circuits Hold That IIRIRA's Repeal Provision Does Not Apply To Certain Cases Where The Immigrant Was Convicted After Trial 8
1. The Third and Eighth Circuits Hold That IIRIRA's Repeal Provision Has No Application to Any Pre-Enactment Convictions 8
2. The Second and Fifth Circuits Hinge Retroactivity Upon a Showing of Subjective Pre-Enactment Reliance 10
3. The Tenth Circuit Holds that IIRIRA's Repeal Provision Does Not Apply to Cases Involving Objective Reliance on the Prior Law 10

B. Four Circuits Hold That IIRIRA's Repeal Applies Categorically To All Defendants Convicted After Trial. 11

C. This Case Exacerbates The Circuit Conflict And Provides An Appropriate Vehicle For Its Resolution. 12

1. The Conflict is Entrenched and Important 12

2. This Case Properly Presents the Question for Decision 19

II. The Court of Appeals' Decision Is Wrong 22

CONCLUSION 27

APPENDIX

Opinion of the U.S. Court of Appeals for the Eleventh Circuit 1a

Decision of the Board of Immigration Appeals (Jan. 25, 2008) 30a

Oral Decision of the Immigration Judge (June 1, 2006) 33a

Decision of the Board of Immigration Appeals (June 11, 2002) 35a

Oral Decision of the Immigration Judge (May 18, 1999) 39a

8 U.S.C. § 1182(c) (1982) 41a

Illegal Immigration Reform and Immigrant Responsibility Act, § 304(b) 42a

TABLE OF AUTHORITIES

Cases

Alvarez-Aceves v. Fasano, 150 F. App'x 596 (9th Cir. 2005) 15

Appel v. Gonzales, 146 F. App'x 175 (9th Cir. 2005) 15

Armendariz-Montoya v. Sonchik, 291 F.3d 1116 (9th Cir. 2002) 4, 11, 15

Armendariz-Montoya v. Sonchik, 539 U.S. 902 (2003) 19

Atkinson v. Att'y Gen., 479 F.3d 222 (3d Cir. 2007) ..... *passim*

Berishaj v. Gonzales, 238 F. App'x 275 (9th Cir. 2007) 15

Binns v. Ashcroft, 540 U.S. 1219 (2004) 19

Camins v. Gonzales, 500 F.3d 872, 884 (9th Cir. 2007) 17, 18

Carranza-De Salinas v. Gonzales, 477 F.3d 200 (5th Cir. 2007) 10, 15, 19

Cerbacio-Diaz v. Gonzales, 234 F. App'x 583 (9th Cir. 2007) 15

Cespedes-Aquino v. Att'y Gen., 498 F.3d 221 (3d Cir. 2007) 13

Chambers v. Reno, 307 F.3d 284 (4th Cir. 2002) 4, 9, 11, 15

Clark v. Martinez, 543 U.S. 371 (2005) 25, 26, 27

Crump v. Reno, 130 F. App'x 500 (2d Cir. 2005) 15

Cruz-Garcia v. Mukasey, 285 F. App'x 446 (9th Cir. 2008) 14, 20

De Johnson v. Holder, 564 F.3d 95 (2d Cir. 2009) 14

Dias v. INS, 311 F.3d 456 (1st Cir. 2002) 4, 11, 15

Dias v. INS, 539 U.S. 926 (2003) 19

Esquivel v. Mukasey, 543 F.3d 919, 922 (7th Cir. 2008) 14

Evangelista v. Ashcroft, 359 F.3d 145 (2d Cir. 2004) 15

Evangelista v. Att'y Gen., 176 F. App'x 306 (3d Cir. 2006) 15

Francis v. INS, 532 F.2d 268 (2d Cir. 1976) 2

Gallardo v. Mukasey, 279 F. App'x 484 (9th Cir. 2008) 14

Garcia v. Fasano, 62 F. App'x 816 (9th Cir. 2003) 15

Garcia-Ortiz v. Gonzales, 194 F. App'x 513 (10th Cir. 2006) 15

Garcia-Zavala v. Ashcroft, 543 U.S. 813 (2004) 19

Haque v. Holder, 312 F. App'x 946 (9th Cir. 2009) 14

Hem v. Maurer, 458 F.3d 1185 (10th Cir. 2006) ..... *passim*

Hernandez v. Gonzales, 437 F.3d 341 (3d Cir. 2006) 18

Hernandez-Castillo v. Moore, 436 F.3d 516 (5th Cir. 2006) 15, 20

Hernandez De Anderson v. Gonzales, 497 F.3d 927 (9th Cir. 2007) 18

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) ..... *passim*

INS v. St. Cyr, 533 U.S. 289 (2001) ..... *passim*

Jaw-Shi Wang v. Ashcroft, 71 F. App'x 624 (9th Cir. 2003) 15

Jimenez-Angeles v. Ashcroft, 291 F.3d 594 (9th Cir. 2002) 18

Karageorgious v. Ashcroft, 374 F.3d 152 (2d Cir. 2004) 18

Kelava v. Gonzales, 434 F.3d 1120 (9th Cir. 2006) 15

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) ..... *passim*

Lawrence v. Ashcroft, 540 U.S. 910 (2003) 19

Lopez-Lopez v. Mukasey, 285 F. App'x 440 (9th Cir. 2008) 14

Lovan v. Holder, No. 08-2177, 2009 U.S. App. LEXIS 16919 (8th Cir. July 31, 2009) ..... *passim*

Magana-Pizano v. INS, 200 F.3d 603, 612 (9th Cir. 1999) 24

Manea v. Mukasey, 301 F. App'x 589 (9th Cir. 2008) 14

Manzo-Garcia v. Gonzales, 225 F. App'x 631 (9th Cir. 2007) 15

Martin v. Hadix, 527 U.S. 343 (1999) 14, 22

Martinez-Murillo v. Mukasey, 267 F. App'x 519 (9th Cir. 2008) 15

Matian v. Mukasey, 262 F. App'x 753 (9th Cir. 2007) 15

Matter of Silva, 16 I. & N. Dec. 26 (BIA 1976) 2

Mbea v. Gonzales, 482 F.3d 276 (4th Cir. 2007) 10, 15

Molina-De La Villa v. Mukasey, 306 F. App'x 389 (9th Cir. 2009) 14

Montenegro v. Ashcroft, 355 F.3d 1035 (7th Cir. 2004) 4, 15

Morgorichev v. Mukasey, 274 F. App'x 98, 101 (2d Cir. 2008) 15

Nadal-Ginard v. Holder, 558 F.3d 61
(1st Cir. 2009) 14, 20

Olatunji v. Ashcroft, 87 F.3d 383
(4th Cir. 2004) ..... *passim*

Ponnapula v. Ashcroft, 373 F.3d 480
(3d Cir. 2004) 15

Prieto-Romero v. Mukasey, 304 F. App'x 512
(9th Cir. 2008) 14

Pugliese v. Gonzales, 174 F. App'x 601
(2d Cir. 2006) 15

Quinones-Saucedo v. Ashcroft, 83 F. App'x 865
(9th Cir. 2003) 15

Rankine v. Reno, 319 F.3d 93 (2d Cir. 2003) 13, 15

Raya-Baez v. INS, 63 F. App'x 381
(9th Cir. 2003) 15

Restrepo v. McElroy, 369 F.3d 627
(2d Cir. 2004) 10, 15

Rivers v. Roadway Express, 511 U.S. 298
(1994) 24

Rodriguez v. Peake, 511 F.3d 1147, 1155
(Fed. Cir. 2008) 19

Rodriguez-Zapata v. Gonzales, 193 F. App'x 312
(5th Cir. 2006) 15

Saravia-Paguada v. Gonzales, 488 F.3d 1122
(9th Cir. 2007) 15, 21

Serrano-Salcedo v. Ashcroft, 56 F. App'x 803
(9th Cir. 2003) 15

Sidhu v. Gonzales, 179 F. App'x 221
(5th Cir. 2006) 15

Singh v. Keisler, 255 F. App'x 710
(4th Cir. 2007) 15

Singh v. Mukasey, 520 F.3d 119

(2d Cir. 2008) 14

Smith v. Doe, 538 U.S. 84 (2003) 23, 24

Swaby v. Ashcroft, 357 F.3d 156 (2d Cir. 2004) 15

Tecat v. Gonzales, 188 F. App'x 308 (5th Cir. 2006) 15

Theodoropoulos v. INS, 358 F.3d 162 (2d Cir. 2002) 15

Thom v. Ashcroft, 369 F.3d 158 (2d Cir. 2004) 15, 21, 24

Trevor v. Reno, 88 F. App'x 445 (2d Cir. 2004) 15

United States v. De Horta Garcia, 519 F.3d 658 (7th Cir. 2008) ..... *passim*

Walcott v. Chertoff, 517 F.3d 149 (2d Cir. 2008) 14

Williams v. Att'y Gen., No. 08-4179, 2009 WL 1510253 (3d Cir. June 1, 2009) 13

Wilson v. Gonzales, 471 F.3d 111 (2d Cir. 2006) 15

Zadvydas v. Davis, 533 U.S. 678 (2001) 26

Zamora v. Gonzales, 240 F. App'x 150 (7th Cir. 2007) 15, 20

Zuluaga Martinez v. INS, 523 F.3d 365 (2d Cir. 2008) 18

Statutes, Regulations, and Rules

8 U.S.C. § 1182(c) ..... *passim*

8 U.S.C. §1229b 2, 24

8 U.S.C. § 1231(a)(6) 25

8 U.S.C. §1251(a)(11) 3

28 U.S.C. § 1254(1) 1

Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) 2

Ill. Rev. Stat. Ch. 56.5 § 1401-A(2) (1983) 3

Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 105-108, § 304(b), 110 Stat. 3009-546 (1996) ..... *passim*

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat 4978 (1990) 2

8 C.F.R. § 1212.3(f)(4) 4

Fed. R. Evid. Rule 410 25

Judicial Materials

Brief for the Respondent in Opposition, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008) (No. 07-820), 2008 WL 809105 13

Brief for the Respondent in Opposition, *Rodriguez-Zapata v. Gonzales*, 127 S. Ct. 2934 (2007) (No. 06-929), 2007 WL 1406224 20

Brief for the Respondent in Opposition, *Hernandez-Castillo v. Gonzales*, 127 S. Ct. 40 (2006) (No. 05-1251), 2006 WL 2136237 20

Brief for the Respondent in Opposition, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008) (No. 07-820), 2008 WL 809105 20

Brief for the Respondent in Opposition, *Saravia-Paguada v. Mukasey*, 128 S. Ct. 2499 (2008) (No.07-866), 2008 WL 623189 21

Brief for the Respondent in Opposition, *Morgorichev v. Holder*, 129 S. Ct. 2424 (2009) (No. 08-771) 2009 WL 1061256 21

Petition for Writ of Certiorari, *United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511 (2007) (No. 07-308), 2007 WL 2608817 14

Petition for Writ of Certiorari, *United States v. Swisher Int'l, Inc.*, 531 U.S. 1036 (2000) (No. 00-415), 2000 WL 34000578 14

Other Authorities

Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57,826 (2004) 20

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sandra Ferguson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 563 F.3d 1254. The decisions of the Board of Immigration Appeals (App., *infra*, 30a-32a, 35a-38a) and the Immigration Judge (App., *infra*, 33a-34a, 39a-40a) are unreported.

JURISDICTION

The court of appeals entered its judgment on March 31, 2009. On June 23, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 29, 2009. On July 16, 2009, Justice Thomas further extended the time for filing to and including August 28, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App., *infra*, 41a-42a.

STATEMENT

1. Prior to 1996, an immigrant convicted of certain otherwise deportable offenses was entitled to seek a discretionary waiver of deportation from the Attorney General under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). That Section authorized the Attorney General to waive deportation or exclusion for immigrants who had a "lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. § 1182(c) (1995); *see generally INS v. St. Cyr*, 533 U.S. 289, 295 (2001). "[A]

substantial percentage" of applications for Section 212(c) relief were granted. *St. Cyr*, 533 U.S. at 296.[1]

During the 1990s, Congress substantially revised the Nation's immigration laws. In 1990, Congress "amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years." *St. Cyr*, 533 U.S. at 297; *see* Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 4978, 5052. Then, in 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, which foreclosed Section 212(c) relief for immigrants convicted "of one or more aggravated felonies." *Id.* § 440, 110 Stat. 1277. Later that same year, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Section 304(b) of which repealed the Attorney General's waiver authority under Section 212(c) altogether. Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597. Congress replaced the waiver provision with a "cancellation of removal" procedure that gave the Attorney General the authority to waive "removal" (*i.e.*, deportation or exclusion) for a very narrow class of immigrants, but precluded such relief for anyone "convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3).

In *INS v. St. Cyr*, this Court held, as a matter of statutory construction, that Congress did not intend for IIRIRA Section 304(b)'s repeal of the waiver provision to have a retroactive effect. The Court held first that IIRIRA contained no "clear indication from Congress that it intended such a [retroactive] result." *Id.* at 316 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265-266 (1994)). The Court held secondly that

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[1] The Board of Immigration Appeals ("BIA") and courts have consistently held that Section 212(c) applies to deportable immigrants as well as excludable aliens. *See Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

applying the statute to St. Cyr would give the statute a "retroactive effect" because it would "attach[] a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269). In particular, because St. Cyr had pled guilty to a deportable offense at a time when the potential for waiver of deportation remained, and St. Cyr "and other aliens like him, almost certainly relied upon [the possibility of obtaining a § 212(c) waiver] in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. Applying the Court's "deeply rooted" "presumption against retroactive legislation," *id.* at 316, the Court accordingly held that Congress did not intend for its repeal of the waiver provision to apply.

2. Petitioner Sandra Ferguson was admitted to the United States as a lawful permanent resident in 1977, at the age of 11. App., *infra*, 3a. Almost a quarter century ago, in 1986, Ferguson was convicted, following a jury trial, of possessing and intending to distribute thirty grams of cocaine, in violation of Illinois law. *See* Ill. Rev. Stat. Ch. 56.5 § 1401-A(2) (1983). She was sentenced to six years imprisonment but was released after serving just two years and nine months. App., *infra*, 3a. At the time of her conviction, the offense subjected her to deportation, 8 U.S.C. § 1251(a)(11) (1989), but her continuous residence in the United States as a lawful permanent resident qualified her to seek a waiver of deportation from the Attorney General under Section 212(c).

A decade later, and two years after Congress's repeal of Section 212(c), the Government commenced removal proceedings against Ferguson. App., *infra*, 3a. The immigration judge found that Ferguson's prior conviction rendered her both removable and ineligible for cancellation of removal under IIRIRA. App., *infra*, 40a. The Board of Immigration Appeals agreed with those findings, *id.* at 36a,

37a, but remanded for the immigration judge to determine whether Ferguson qualified for the Attorney General's waiver of deportation under Section 212(c) based on this Court's then-recent decision in *St. Cyr*, *id.* at 37a.

On remand, the immigration judge found that IIRIRA's repeal of the waiver provision applied to Ferguson because her conviction followed a jury trial rather than a guilty plea. App., *infra*, 34a. The Board of Immigration Appeals affirmed based on the Attorney General's promulgation of a new regulation reading *St. Cyr* as limited to guilty pleas. App., *infra*, 30a-31a (citing 8 C.F.R. § 1212.3(f)(4)).

3. The court of appeals denied Ferguson's petition for review. App., *infra*, 29a. The court noted at the outset that the "circuits are split on how to apply *St. Cyr* to aliens outside of the guilty plea context." App., *infra*, 15a. Some circuits, the court explained, have held that "IIRIRA does not have an impermissible retroactive effect on aliens who relied on § 212(c) relief in deciding to go to trial." App., *infra*, 15a (citing *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1036-1037 (7th Cir. 2004); *Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002); *Chambers v. Reno*, 307 F.3d 284, 290-293 (4th Cir. 2002)).[2] The Second and Fifth Circuits, however, have held that, while IIRIRA's repeal has an impermissible retroactive effect on those who pled guilty prior to the statute's enactment, it generally has no retroactive effect as applied to immigrants convicted at trial, unless the immigrant makes an "individualized showing" of reliance on the availability of Section 212(c) relief in deciding whether to proceed to trial, in which case the statute's impermissible

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[2] The Seventh Circuit allows an exception for immigrants who went to trial but "conceded deportability before repeal" and can show "reliance on the possibility of § 212(c) relief." *See United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008).

retroactive effect reemerges. App., *infra*, 17a-19a. On the other hand, the Tenth Circuit "extends *St. Cyr* beyond the guilty plea context and rejects a requirement of actual, subjective reliance," in favor of a requirement of "objectively reasonable reliance." App., *infra*, 19a. "The Third Circuit, on the other hand, does not require aliens to show reliance or a reliance interest – either objective or subjective," holding instead that IIRIRA's repeal of Section 212(c) has a retroactive effect because "it attaches new legal consequences to an alien's criminal conviction" without regard to how that conviction was obtained. App., *infra*, 20a.[3]

Concluding that this Court "has refused to adopt a rigid, single test for determining whether a statute has an impermissible retroactive effect," the Eleventh Circuit here opted "to focus on the reliance elements, as laid out in *St. Cyr*" rather than the multi-factor retroactivity analysis "put forth in cases such as *Landgraf*." App., *infra*, 28a. The court then held that whether IIRIRA's repeal provision has a retroactive effect turns solely on whether the immigrant actually relied on the prior law in some "'transactions' or 'considerations already past.'" *Id.* at 29a; *see id.* ("We therefore hold that reliance is a component of the retroactivity analysis."). Finding no particularized evidence of reliance here, *id.* at 29a, the court of appeals denied the petition for review.

REASONS FOR GRANTING THE WRIT

This Court's review is necessary to resolve an ever-expanding and intractable conflict in the circuits on an important and recurring question of federal law that continues to affect thousands of individuals across the nation. Whether a statutory provision applies to pre-enactment conduct is

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[3] Since the court of appeal's decision, the Eighth Circuit has joined the fray and sided with the Third Circuit. *Lowan v. Holder*, No. 08-2177, 2009 U.S. App. LEXIS 16919, *6-*7 (8th Cir. July 31, 2009).

ultimately a question of statutory construction, and the longstanding "presumption against retroactivity" "allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes," and affords "legislators a predictable background rule against which to legislate." *Landgraf*, 511 U.S at 272-273. In *St. Cyr*, this Court applied that established rule of statutory construction to hold that IIRIRA's repeal of Section 212(c)'s waiver provision was not intended to have retroactive effect. 533 U.S. at 326.

Like this case, *St. Cyr* involved a lawful permanent resident whose pre-IIRIRA conviction of a criminal offense rendered the alien deportable and ineligible for discretionary relief under IIRIRA's cancellation of removal provision. *Id.* at 293. At the time of both the underlying criminal conduct and of conviction, however, both St. Cyr and Ferguson were eligible to seek a waiver of deportation from the Attorney General under Section 212(c). The only difference is that St. Cyr's conviction was obtained through a guilty plea and Ferguson's through the exercise of her constitutional right to a trial. Based on that difference in how the immigrants' convictions were obtained, the courts of appeals have adopted widely varying decisions on IIRIRA Section 304(b)'s retroactive effect. As a result, a single provision of a single federal statute has divergent operation across the Country, resulting in profoundly life-altering differences in the law's effect for immigrants based on nothing more than geography. The sheer volume of cases raising the question and decrying the lack of clarity in retroactivity jurisprudence demonstrates the importance of this Court's intervention.

More broadly, the conflict in the circuits presented here is simply one example of widespread "substantial confusion" in the courts of appeals "as to whether a party must prove some form of reliance in order to demonstrate that a statute is impermissibly retroactive." *Olatunji v. Ashcroft*, 387 F.3d 383, 390 (4th Cir. 2004). The court of appeals' confusion is

rooted in this Court's precedent. *Ibid.* ("This confusion exists within the Supreme Court, in its decisions postdating *Landgraf*."). Accordingly, only this Court's intervention can bring needed uniformity and stability to federal law.

I. The Courts Of Appeals Have Splintered Over The Retroactivity Of IIRIRA's Repeal Of The Attorney General's Waiver Authority Under Section 212(c).

There is no dispute that Congress did not express in IIRIRA its intent that Section 304(b)'s repeal of the waiver provision have a retroactive effect. *See St. Cyr*, 533 U.S. at 320. The courts of appeals, however, are deeply divided over whether and when Section 304(b) has an "impermissible retroactive effect" as applied to convictions entered prior to IIRIRA's enactment following a jury trial, rather than a guilty plea.

The Eleventh Circuit's decision in this case adds to an existing disarray in the courts of appeals' cases. Prior to the decision here, five circuits had held that IIRIRA's repeal of Section 212(c) does not apply to at least some convictions obtained after trial, while four other circuits had held that the repeal applies to all convictions obtained through trial prior to 1996. Within the former group, the courts of appeals have sub-divided further with two courts of appeals holding that IIRIRA's repeal does not apply to any pre-enactment convictions, while three other circuits require some showing of either subjective or objective pre-enactment reliance.

A. Five Circuits Hold That IIRIRA's Repeal Provision Does Not Apply To Certain Cases Where The Immigrant Was Convicted After Trial.

1. The Third and Eighth Circuits Hold that IIRIRA's Repeal Provision Has No Application to Any Pre-Enactment Convictions.

Following this Court's lead in *St. Cyr*, the Third Circuit has construed IIRIRA's repeal of the Attorney General's waiver authority as not applying to convictions entered before 1996. *See Atkinson v. Att'y Gen.*, 479 F.3d 222 (3d Cir. 2007). Contrary to the Eleventh Circuit's holding here, the Third Circuit has recognized that "[n]owhere in the Supreme Court's jurisprudence * * * has reliance (or any other guidepost) become the *sine qua non* of the retroactive effects inquiry." *Id.* at 231. For example, as the Third Circuit explained, in *Landgraf* itself this Court concluded that applying a new punitive damages remedy to pre-enactment conduct would have retroactive effect, even though it was implausible to think that the absence of a punitive damages remedy would have informed or influenced an employer's decision whether or not to engage in long-outlawed sexual discrimination in employment. *Id.* at 228.

The Third Circuit further noted that this Court followed a similar course in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), in which the Court held that the removal of a defense had a retroactive effect without requiring defendants to show that they had relied on the existence of the defense in their pre-enactment conduct. *Atkinson*, 479 F.3d at 228-229. The Third Circuit acknowledged that, although "reliance" "is an element to consider in determining whether the enactment of a new law" has a retroactive effect, cases like *Landgraf* and *Hughes* demonstrate that "whether the party before the court actually

relied on the prior state of the law is not the conclusive factor." *Id.* at 229.

Instead, the Third Circuit focused on the central *Landgraf* inquiry: whether the withdrawal of Section 212(c) relief "attached new legal consequences to [the immigrant's] conviction." *Atkinson*, 479 F.3d at 230. And the court concluded that, under the new law, the consequence of a prior deportable offense is *certain* deportation, whereas at the time of the offense the consequence was *possible* deportation that could be avoided by a successful application under Section 212(c). *Ibid.*; *see St. Cyr*, 533 U.S. at 325 ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.").

Recently, the Eighth Circuit followed suit, expressly adopting the Third Circuit's position that IIRIRA's repeal provision does not apply to pre-enactment convictions, whether obtained through plea or trial. *Lovan v. Holder*, No. 08-2177, 2009 U.S. App. LEXIS 16919, *6-*7 (8th. Cir. July 31, 2009). What is critical, the Eighth Circuit explained, is that IIRIRA's repeal of Section 212(c)'s waiver program "attached a new legal consequence to [an immigrant's] conviction: the certainty – rather than the possibility – of deportation." *Id.* at *7.

Furthermore, in the closely analogous context of IIRIRA's application to convictions barring reentry into the United States, the Fourth Circuit has expressly adopted the Third Circuit's analysis and held that "reliance, in any form, is irrelevant to the retroactivity inquiry." *Olatunji*, 387 F.3d at 396. In the Fourth Circuit's view, what is controlling is that IIRIRA "attaches *new legal consequences*" to an immigrant's pre-enactment "*conviction*." *Id.* at 395, 396.[4]

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[4] Underscoring the depth of confusion in circuit law, other Fourth Circuit cases hold that a defendant convicted after trial is categorically ineligible for section 212(c) relief. *See Chambers v. Reno*, 307 F.3d 284,

2. The Second and Fifth Circuits Hinge Retroactivity Upon a Showing of Subjective Pre-Enactment Reliance.

While the Second and Fifth Circuits agree that IIRIRA's repeal of Section 212(c) can have a retroactive effect on convictions, regardless of whether they were obtained by trial or plea, those two circuits part company with the Third And Eighth Circuits by hinging their analysis on whether the immigrant can make an individualized showing of subjective reliance on the availability of Section 212(c) relief in deciding to proceed to trial. *See Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007). For example, the immigrant might have delayed applying for Section 212(c) relief "in order to establish a history of rehabilitation" that would improve her chances of obtaining relief. *Carranza-De Salinas*, 477 F.3d at 206; *see Restrepo*, 369 F.3d at 633.

3. The Tenth Circuit Holds that IIRIRA's Repeal Provision Does Not Apply to Cases Involving Objective Reliance on the Prior Law.

The Tenth Circuit likewise agrees with the Third, Eighth, Second, and Fifth Circuits that IIRIRA's repeal can have a disfavored retroactive effect when applied to pre-1996 convictions, regardless of the procedure by which they were obtained. The Tenth Circuit furthermore agrees with the Second and Fifth Circuits (in conflict with the Third and Eighth) that reliance is the key to whether the repeal has an impermissible retroactive effect. But unlike the Second and

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290-93 (4th Cir. 2002); *Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007). *Mbea*, decided several years after *Olatunji*, did not even mention that decision. *See Lovan v. Holder*, No. 08-2177, 2009 U.S. App. LEXIS 16919, *6 n.1 (8th. Cir. July 31, 2009) (noting the confusion in Fourth Circuit law); *Hem v. Maurer*, 458 F.3d 1185, 1192 n.4 (10th Cir. 2006) (noting the "tension between *Olatunji* and *Chambers*").

Fifth Circuits, Tenth Circuit law does not require the immigrant to make an individualized showing of subjective reliance. Instead, it is sufficient that the immigrant belongs to a class of individuals for whom reliance on the availability of Section 212(c) would be "objectively reasonable." *Hem v. Maurer*, 458 F.3d 1185, 1200 (10th Cir. 2006). The Tenth Circuit thus considers, for example, whether the immigrant forewent an appeal in her criminal case, reasoning that it would be objectively reasonable for a defendant to forgo an appeal out of a concern that a successful appeal could lead to a new trial with a higher sentence that could render the defendant ineligible for Section 212(c) relief. *Id.* at 1199.

B. Four Circuits Hold That IIRIRA's Repeal Applies Categorically To All Defendants Convicted After Trial.

The First, Fourth (*but see note* 4, *supra*), Seventh, and Ninth Circuits have held that a defendant convicted after a trial is categorically ineligible for Section 212(c) relief on the ground that a guilty plea, rather than a conviction at trial, is an indispensable prerequisite to finding that IIRIRA's repeal has a disfavored retroactive effect. *See Dias*, 311 F.3d at 458; *Chambers*, 307 F.3d at 293; *United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008); *Armendariz-Montoya*, 291 F.3d 1116, 1121 (9th Cir. 2002). Those courts of appeals have read *St. Cyr*'s holding to turn fundamentally on the immigrant's presumed reliance upon the availability of Section 212(c) relief in deciding to waive his right to trial. Because in those courts' view, the decision to go to trial would not entail that same presumed *quid pro quo*, those circuits have concluded that the repeal of Section 212(c) can be applied to convictions that pre-date IIRIRA's enactment without imposing a disfavored retroactive effect. *See, e.g., Dias*, 311 F.3d at 458; *Chambers*, 307 F.3d at 290.

The Seventh Circuit, however, has created a limited exception to its otherwise categorical rule. That court holds

that IIRIRA Section 304(b) does not apply to pre-enactment trial convictions if the immigrant "conceded deportability before repeal in reliance on the possibility of § 212(c) relief." *De Horta Garcia*, 519 F.3d at 661.

C. This Case Exacerbates The Circuit Conflict And Provides An Appropriate Vehicle For Its Resolution.

In this case, the Eleventh Circuit sided with the circuits that have "decline[d] to extend *St. Cyr* to aliens who were convicted after trial because such aliens' decisions to go to trial do not satisfy *St. Cyr*'s reliance requirement." App., *infra*, 29a. In so doing, the Eleventh Circuit expressly departed from the approach taken by the Third Circuit and since adopted by the Eighth Circuit. App., *infra*, 26a ("We decline to adopt the [Third Circuit] approach urged by Ferguson."). In addition, the court of appeals rejected the Tenth Circuit's rule that requires only objective reliance, holding instead that whether IIRIRA applies to pre-enactment convictions turns on petitioner's individual inability to prove "'transactions' or 'considerations already past' on which she relied." App., *infra*, 29a. The court, moreover, expressed some sympathy for the even stricter rule of the First, Fourth, Seventh, and Ninth Circuits, suggesting that the Eleventh Circuit may one day join them in holding that *St. Cyr* is categorically limited to the guilty plea context. *See* App., *infra*, 29a & n.28.

That circuit conflict is ripe for resolution by this Court at this time and in this case.

1. The Conflict is Entrenched and Important.

The circuit conflict is considered, longstanding, and entrenched. With the Eleventh Circuit's decision here, ten courts of appeals have now expressly considered and decided whether IIRIRA's repeal of Section 212(c) applies to pre-enactment convictions entered following a trial, rather than a guilty plea, and those decisions have produced a multi-tiered

conflict in the circuits from which the courts of appeals cannot disentangle themselves. The Eleventh Circuit made its decision in conscious rejection of the law adopted in the Third and Tenth Circuits. App., *infra*, 19a-22a, 29a. The Second, Third, and Tenth Circuits have similarly considered the conflicting rationales of other circuits, but have found them unpersuasive. *See Rankine v. Reno*, 319 F.3d 93, 102 (2d Cir. 2003); *Atkinson*, 479 F.3d at 227; *Hem*, 458 F.3d at 1191-1192. The Third Circuit, for example, although aware of its minority status, has continued to apply and reaffirm its rule in recent cases. *See, e.g., Williams v. Att'y Gen.*, No. 08-4179, 2009 WL 1510253, at *1 (June 1, 2009 3d Cir.); *Cespedes-Aquino v. Att'y Gen.*, 498 F.3d 221, 224-225 (3d Cir. 2007). And the Eighth Circuit recently adopted the same view as the Third Circuit, fully aware that it was joining the minority position. *Lovan*, 2009 U.S. App. LEXIS 16919, at *6-*7.

The Solicitor General has opposed certiorari in the past on the ground that the conflict "has diminishing prospective significance because it affects only removal proceedings for aliens convicted at trials before" 1996. Brief for the Respondent in Opposition at 13, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008) (No. 07-820), 2008 WL 809105. That argument fails for two reasons.

First, the government does not adhere to its own argument. The question here has the same significance and prospective import that the application of IIRIRA to plea bargains entered before 1996 had in *St. Cyr*. Yet in *St. Cyr*, it was the *government* itself that argued vigorously for and obtained this Court's certiorari review notwithstanding the purportedly "diminishing prospective significance" of the retroactivity question to pre-1996 plea bargains.

Moreover, while temporal limitations may appropriately influence the certiorari calculus in most contexts, it should not be accorded significance in cases involving the retroactive effect of federal statutes. That is because in every such case –

whether *St. Cyr*, *Hughes*, *Landgraf*, or *Martin v. Hadix*, 527 U.S. 343 (1999) – the question of a statute's retroactive effect is, by definition, of limited prospective significance.[5] Rather, when retroactivity is at issue, the more appropriate considerations are the sheer number of individuals affected and the severity of the impact. Both of those factors warrant this Court's exercise of its certiorari jurisdiction here.

The sheer number of circuit decisions – not to mention Board of Immigration Appeals cases – implicating the retroactive effect of IIRIRA's repeal of the Attorney General's discretionary waiver authority is a testament to its recurring importance and the significant reach a decision of this Court would have today and for a long time to come.[6]

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[5] Indeed, elsewhere the Government has not been deterred from seeking this Court's review of questions that are unlikely to recur or of arguably time-limited significance. *See, e.g.*, Petition for Writ of Certiorari, *United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511 (2007) (No. 07-308), 2007 WL 2608817 (seeking and obtaining review of question pertaining to tax refund claims for a tax the government had ceased to enforce years earlier); Petition for Writ of Certiorari, *United States v. Swisher Int'l, Inc.*, 531 U.S. 1036 (2000) (No. 00-415), 2000 WL 34000578 (seeking review of question of which statutory provision confers jurisdiction on the Court of International Trade to award refunds of a particular tax that had been found unconstitutional and therefore was no longer collected).

[6] The issue has arisen more than fifty-five times in the courts of appeals since *St. Cyr* was decided, many of these decisions in recent years. *See, e.g.*, *De Johnson v. Holder*, 564 F.3d 95 (2d Cir. 2009); *Nadal-Ginard v. Holder*, 558 F.3d 61 (1st Cir. 2009); *Haque v. Holder*, 312 F. App'x 946 (9th Cir. 2009); *Molina-De La Villa v. Mukasey*, 306 F. App'x 389 (9th Cir. 2009); *Lovan*, 2009 U.S. App. LEXIS 16919; *Esquivel v. Mukasey*, 543 F.3d 919 (7th Cir. 2008); *Singh v. Mukasey*, 520 F.3d 119 (2d Cir. 2008); *United States v. De Horta Garcia*, 519 F.3d 658, (7th Cir. 2008); *Walcott v. Chertoff*, 517 F.3d 149 (2d Cir. 2008); *Prieto-Romero v. Mukasey*, 304 F. App'x 512 (9th Cir. 2008); *Manea v. Mukasey*, 301 F. App'x 589 (9th Cir. 2008); *Cruz-Garcia v. Mukasey*, 285 F. App'x 446 (9th Cir. 2008); *Lopez-Lopez v. Mukasey*, 285 F. App'x 440 (9th Cir. 2008); *Gallardo v. Mukasey*, 279 F. App'x 484 (9th Cir. 2008);

Furthermore, the interests at stake are profound – the retroactivity question can be the difference between certain deportation after years, if not decades, of living and developing ties to the United States, and the opportunity for an immigrant to stay in her home and with her family. For example, in this case, Ms. Ferguson has lived in the United States for more than thirty years – nearly three-fourths of her life – and the "certain deportation" that application of IIRIRA

Morgorichev v. Mukasey, 274 F. App'x 98 (2d Cir. 2008); *Martinez-Murillo v. Mukasey*, 267 F. App'x 519 (9th Cir. 2008); *Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007); *Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007); *Atkinson*, 479 F.3d 222; *Carranza-De Salinas*, 477 F.3d 200; *Matian v. Mukasey*, 262 F. App'x 753 (9th Cir. 2007); *Singh v. Keisler*, 255 F. App'x 710 (4th Cir. 2007); *Zamora v. Gonzales*, 240 F. App'x 150 (7th Cir. 2007); *Berishaj v. Gonzales*, 238 F. App'x 275 (9th Cir. 2007); *Cerbacio-Diaz v. Gonzales*, 234 F. App'x 583 (9th Cir. 2007); *Manzo-Garcia v. Gonzales*, 225 F. App'x 631 (9th Cir. 2007); *United States v. Munoz-Recillas*, 224 F. App'x 621 (9th Cir. 2007); *Wilson v. Gonzales*, 471 F.3d 111 (2d Cir. 2006); *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006); *Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006); *Kelava v. Gonzales*, 434 F.3d 1120 (9th Cir. 2006); *Garcia-Ortiz v. Gonzales*, 194 F. App'x 513 (10th Cir. 2006); *Rodriguez-Zapata v. Gonzales*, 193 F. App'x 312 (5th Cir. 2006); *Tecat v. Gonzales*, 188 F. App'x 308 (5th Cir. 2006); *Sidhu v. Gonzales*, 179 F. App'x 221 (5th Cir. 2006); *Evangelista v. Att'y Gen.*, 176 F. App'x 306 (3d Cir. 2006); *Pugliese v. Gonzales*, 174 F. App'x 601 (2d Cir. 2006); *Alvarez-Aceves v. Fasano*, 150 F. App'x 596 (9th Cir. 2005); *Crump v. Reno*, 130 F. App'x 500 (2d Cir. 2005); *Appel v. Gonzales*, 146 F. App'x 175 (9th Cir. 2005); *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004); *Restrepo*, 369 F.3d 627; *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004); *Evangelista v. Ashcroft*, 359 F.3d 145 (2d Cir. 2004); *Swaby v. Ashcroft*, 357 F.3d 156 (2d Cir. 2004); *Montenegro*, 355 F.3d 1035; *Trevor v. Reno*, 88 F. App'x 445 (2d Cir. 2004); *Rankine*, 319 F.3d 93; *Quinones-Saucedo v. Ashcroft*, 83 F. App'x 865 (9th Cir. 2003); *Jaw-Shi Wang v. Ashcroft*, 71 F. App'x 624 (9th Cir. 2003); *Raya-Baez v. INS*, 63 F. App'x 381 (9th Cir. 2003); *Garcia v. Fasano*, 62 F. App'x 816 (9th Cir. 2003); *Serrano-Salcedo v. Ashcroft*, 56 F. App'x 803 (9th Cir. 2003); *Theodoropoulos v. INS*, 358 F.3d 162 (2d Cir. 2002); *Dias*, 311 F.3d 456; *Chambers*, 307 F.3d 284; *Armendariz-Montoya*, 291 F.3d 1116.

entails, *St. Cyr*, 533 U.S. at 325, will tear her away from her three children, her mother, and her five siblings, all of whom are U.S. citizens.

Second, the implications of IIRIRA's repeal are not as time limited as the Solicitor General's argument suggests because the government can initiate removal proceedings and invoke a prior conviction as the basis for removal without time limitation years and decades after the fact. In this case, the government waited more than a decade after Ms. Ferguson's conviction to initiate removal proceedings, and the government remains free years or decades from now to do the same against other immigrants based on youthful convictions. Individuals subject to deportation will continue to come to the government's attention through routine inspections of those returning from travel abroad, workplace raids, investigations of the alleged hiring of illegal immigrants, and arrests for subsequent offenses. Thus, the significance of the question presented here will endure for the entire lifespans of immigrants who were old enough to have committed a qualifying crime in 1995 or earlier. The expansiveness of that timeframe counsels in favor of certiorari review to bring stability and uniformity to the law for both the government and the individuals involved.

Third, the government's argument overlooks that confusion over the proper test for retroactivity and the role of reliance in it extends beyond the Section 212(c) context. In *Olatunji*, the Fourth Circuit confronted an analogous question of IIRIRA's application to a pre-enactment conviction where that conviction would have barred a lawful permanent resident's reentry into the United States. 387 F.3d at 386. The Fourth Circuit held – just as the Third Circuit had in *Atkinson* – that "reliance (whether subjective or objective) is not a requirement of impermissible retroactivity." *Id.* at 388. In conflict with the Eleventh Circuit's decision here, *Olatunji* specifically held that "subjective reliance" should not be "relevant to the question of whether a particular statute is

impermissibly retroactive, as such is neither dictated by Supreme Court precedent nor related to the presumption of congressional intent underlying the bar against retroactivity." *Id.* at 389.

Instead, tracking the Third Circuit's approach with respect to IIRIRA's repeal of Section 212(c), the Fourth Circuit held that whether the immigrant was convicted by way of guilty plea or jury trial was irrelevant to the retroactivity inquiry. What is relevant, the court held, is that "IIRIRA has attached new legal consequences to the *conviction*." *Olatunji*, 387 F.3d at 396.

The Fourth Circuit in *Olatunji*, moreover, expressly recognized the need for this Court's intervention, explaining that this Court's precedent "has generated substantial confusion as to whether a party must prove some form of reliance," and that "confusion extends throughout the Courts of Appeals." *Olatunji*, 387 F.3d at 390. Indeed, the government itself, the Fourth Circuit noted, "vacillated in response to the pointed question of whether reliance remains a requirement." *Id.* at 391.

Stressing that "[r]etroactivity is a question of congressional intent," *Olatunji*, 387 F.3d at 389, the Fourth Circuit echoed the Third Circuit's judgment that making the application of a single statutory provision vary based on the reliance conduct of individuals is "unsupported and unsupportable," *id.* at 394. "[T]here is no basis for inferring that Congress' intent was any more nuanced than that statutes should not be held to apply" to pre-enactment events, the Fourth Circuit concluded. *Ibid.* "Anything more, in the face of complete congressional silence, is nothing but judicial legislation." *Ibid.*

In *Camins v. Gonzales*, 500 F.3d 872, 884 (9th Cir. 2007), the Ninth Circuit adopted a different view of the same provision, agreeing that it could in some cases have an impermissible retroactive effect but holding that immigrants

"making a *Landgraf* retroactivity argument cannot prevail if they cannot plausibly claim that they would have acted . . . differently if they had known about the elimination of [the] relief." *Id.* at 884 (quoting *Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 939 (9th Cir. 2007)).

Indeed, disagreement and confusion over the role of reliance in retroactivity analysis pervade the interpretation of other immigration provisions as well. *See, e.g., Hernandez De Anderson*, 497 F.3d at 938 (noting, in the context of an analysis of INA Section 244(a)(2), that "*St. Cyr* has produced considerable disagreement among the courts of appeals concerning whether 'reasonable reliance' on pre-IIRIRA relief from deportation is a required element of a *Landgraf* claim to that relief and, if some form of reliance is required, what form it must take"); *Zuluaga Martinez v. INS*, 523 F.3d 365, 386 (2d Cir. 2008) (Straub, J., concurring) (noting, in the context of an analysis of INA Section 240A(d)(1), that "whether – and to what extent – a showing of reliance on the prior law is required to demonstrate impermissible retroactive effect of a new law is the subject of much debate and, perhaps, 'should be re-visited' or reviewed.") (quoting *De Horta Garcia*, 519 F.3d at 666 (Rovner, J., concurring)).[7]

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[7] *See also, e.g., Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602 (9th Cir. 2002) (INA Section 240A(d) not "impermissibly retroactive" because no reliance established); *Hernandez v. Gonzales*, 437 F.3d 341, 352 (3d Cir. 2006) ("Because our colleagues in the Second and Ninth Circuits engage in a retroactivity analysis different from the one we apply, [*Karageorgious v. Ashcroft*, 374 F.3d 152 (2d Cir. 2004)] and *Jimenez-Angeles* are distinguishable."); *Zuluaga*, 523 F.3d at 373, 375 (concluding that INA Section 240A(d)(1) "would not have an impermissible retroactive effect if applied to [petitioner's] 1995 offense" without considering reliance and noting that "[o]ur decision remains sound when reasonable reliance is taken into consideration"); *Hernandez De Anderson*, 497 F.3d at 941 (adopting the Tenth Circuit's objective reliance standard for INA Section 244(a)(2) retroactivity analysis and "hold[ing] that individuals demonstrate reasonable reliance on pre-IIRIRA law and

The questions presented thus are of wide-ranging and enduring importance both within and beyond the Section 212(c) context, and the widespread confusion in the law of the circuits warrants this Court's review.

2. This Case Properly Presents the Question for Decision.

Unlike prior petitions raising the question of Section 304(b)'s application to pre-enactment trial convictions, for which this Court's review has been denied, the present case provides a proper and timely vehicle for resolving the entrenched and expanding circuit conflict.

First, early petitions, some filed in the immediate aftermath of this Court's decision in *St. Cyr*, were premature.[8] There was no circuit split at all until 2004 when the Second Circuit adopted a subjective reliance standard, and the conflict became acute only in 2007, after the Tenth Circuit adopted its "objective reliance" standard, the Fifth Circuit adopted the subjective reliance standard, and the Third Circuit held that *St. Cyr* applies to all cases involving pre-1996 convictions. *Hem*, 458 F.3d at 1197; *Carranza-de Salinas*, 477 F.3d at 208; *Atkinson*, 479 F.3d at 230. Now, with the Eighth Circuit's adoption of the Third Circuit

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plausibly claim that they would have acted * * * differently if they had known about the elimination of [the] relief if it would have been objectively reasonable under the circumstances to rely on the law at the time") (internal quotation marks omitted); *see generally Rodriguez v. Peake*, 511 F.3d 1147, 1155 (Fed. Cir. 2008) ("[T]he D.C. Circuit appears to view the familiar considerations [of fair notice, reasonable reliance, and settled expectations] as akin to a tiebreaker in close cases.") (internal quotation marks omitted).

[8] *See, e.g., Garcia-Zavala v. Ashcroft*, 543 U.S. 813 (2004); *Binns v. Ashcroft*, 540 U.S. 1219 (2004); *Lawrence v. Ashcroft*, 540 U.S. 910 (2003); *Dias v. INS*, 539 U.S. 926 (2003); *Armendariz-Montoya v. Sonchik*, 539 U.S. 902 (2003).

approach, the courts have fractured even further, and *Olatunji* establishes that the split is expanding into new contexts.

Second, the Government has previously opposed certiorari on the ground that courts should be given an opportunity to reconsider their positions in light of regulations issued in 2004.[9] But over five years after the regulations were issued, the circuit conflict shows no signs of abating and, in fact, has worsened significantly.[10]

Third, beyond the absence of a clear circuit split and the uncertain effect of the regulations, other petitions were plagued by vehicle problems. In some, there were serious questions whether the petitioner met the criteria for being considered for discretionary relief under Section 212(c), making the question presented potentially irrelevant to the petitioner's entitlement to relief,[11] and in others, the question was not squarely presented or the focus of the petition.[12]

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[9] *See, e.g.*, Brief for the Respondent in Opposition at 14-15, *Rodriguez-Zapata v. Gonzales*, 127 S. Ct. 2934 (2007) (No. 06-929), 2007 WL 1406224 (arguing that it would be "premature" for the Court to consider whether the rule in *St. Cyr* extends to immigrants convicted after trial because the Attorney General's final rule on the subject, *Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004)), had only been considered by "a few courts"); Brief for the Respondent in Opposition at 9, *Hernandez-Castillo v. Gonzales*, 127 S. Ct. 40 (2006) (No. 05-1251), 2006 WL 2136237 (same).

[10] Indeed, several circuits have considered the regulations and expressly declined to change their positions. *See, e.g.*, *Nadal-Ginard*, 558 F.3d at 70 n.8; *Hernandez-Castillo v. Moore*, 436 F.3d at 519.

[11] *See, e.g.*, *Cruz-Garcia v. Mukasey*, 285 F. App'x 446 (9th Cir. 2008), *cert denied sub nom.*, *Cruz-Garcia v. Holder*, No. 08-878 (2009); *Zamora v. Gonzales*, 240 F. App'x 150 (7th Cir. 2007), *cert denied sub nom.*, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008); Brief for the Respondent in Opposition at 6-7, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008) (No. 07-820), 2008 WL 809105 (arguing petition does not squarely present the question of the retroactive effect of Section 212(c)'s

This case suffers from none of those difficulties. It squarely presents the question of whether defendants convicted of a deportable offense after trial prior to the repeal of Section 212(c) are eligible for relief under that provision, and there is no dispute that petitioner would otherwise qualify for relief. Indeed, she is a strong candidate for relief, having served her sentence for a single crime committed over twenty-three years ago, having spent the past twenty-one years as a productive and law-abiding member of her community, and having developed strong family ties to the United States, through her three children, her mother, and her five siblings, who are all citizens. *See St. Cyr*, 533 U.S. at 296 (noting that "a substantial percentage" of applications for Section 212(c) relief were granted when it was available). Moreover, the question presented was pressed and thoroughly considered below, and the court of appeals' decision determined the outcome of the case.

Fourth, the government has argued in the past that cases involving immigrants who make no claim of actual reliance do not merit review because they do not implicate the conflict between courts requiring subjective and objective reliance. *See, e.g.*, Brief for the Respondent in Opposition at 11-12, *Morgorichev v. Holder*, 129 S. Ct. 2424 (2009) (No. 08-771), 2009 WL 1061256. But that argument simply begs the question of whether reliance is an indispensable prerequisite to establishing that a statute has retroactive effect – a

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repeal); *Thom*, 369 F.3d at 164 n. 8 (noting that five-year bar might "independently preclude [petitioner] from 212(c) eligibility").

[12] *See, e.g.*, *Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007), *cert denied sub nom.*, *Saravia-Paguada v. Mukasey*, 128 S. Ct. 2499 (2008); Brief for the Respondent in Opposition at 7-8, *Saravia-Paguada v. Mukasey*, 128 S. Ct. 2499 (2008) (No.07-866), 2008 WL 623189; Brief for the Respondent in Opposition at 12-15, *Morgorichev v. Holder*, 129 S. Ct. 2424 (2009) (No. 08-771), 2009 WL 1061256 (discussing numerous other issues raised by petition).

predicate question to that which the government poses and on which the courts are deeply divided. Six circuits have held that reliance is entirely irrelevant – the Third and Eighth Circuits because the repeal of Section 212(c) has a retroactive effect even in the absence of reliance, and the First, Fourth, Seventh, and Ninth Circuits because they view *St. Cyr* as categorically limited to the plea-bargain context. Four other circuits – the Second, Fifth, Tenth, and Eleventh here – hold precisely the opposite, making reliance an indispensable prerequisite to relief under that provision. Moreover, confusion over the indispensability of reliance *vel non* has generated confusion in immigration law beyond the Section 212(c) context, as *Olatunji* illustrates.

In short, the division in the circuits on the role of reliance in retroactivity analysis is expanding. Contrary to the government's prior arguments, that conflict shows no evidence of dissipating in the Section 212(c) context and, in fact, is expanding into new aspects of immigration law. Moreover, the government continues and will continue for years to initiate removal proceedings that implicate the Section 212(c) retroactivity question. This Court's resolution of the conflict thus would bring stability and uniformity to the law – to the benefit of courts, immigrants, and the government.

II. The Court Of Appeals' Decision Is Wrong.

The Eleventh Circuit's decision also warrants review because it is wrong, contravening this Court's established jurisprudence in three significant respects.

First, the inquiry into whether IIRIRA Section 304(b)'s repeal of the Attorney General's waiver authority has retroactive effect entails a straightforward "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321 (quoting *Martin*, 527 U.S. at 357-358) (internal quotation marks omitted). Here, IIRIRA attached a "new legal consequence[]" to

Ferguson's pre-enactment conviction – the legal effect of the conviction now is "certain deportation" rather than "possible deportation." *Id.* at 325. In that respect, the repeal of the waiver provision is indistinguishable from the repeal of the affirmative defense in *Hughes*. While the defendant may not have prevailed in the defense even if it remained available, for those defendants with no other viable defense, the repeal meant the difference between "certain" and merely "possible" liability. That change, the Court held, was sufficient to give the repeal retroactive effect. *Hughes*, 520 U.S. at 951-952.

To be sure, demonstrating reliance in prior decisionmaking could be one way of showing that a new legal consequence has attached to prior conduct. But nothing in this Court's articulation of the test for retroactivity mentions "reliance" or affords it the dispositive weight the Eleventh Circuit gave it here. Indeed, reliance is not even a required element for identifying *unconstitutional* retroactivity under the Ex Post Facto Clause. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 97 (2003) (identifying the traditional *Mendoza-Martinez* factors). There thus is no sound basis for the transcendence bestowed on that single factor by the Eleventh Circuit and some of its sister circuits. To the contrary, both *Landgraf* and *Hughes* found retroactive effect in the absence of any evidence of reliance.[13]

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[13] *See Hughes*, 520 U.S. at 951-952 (holding that an amendment to the False Claims Act that eliminated a defense to *qui tam* suits had an impermissible retroactive effect without citing any evidence of reliance by the company); *Hem*, 458 F.3d at 1193 (Supreme Court's decision in *Hughes* was made "without even a single word of discussion as to whether Hughes Aircraft – or, for that matter, similarly situated government contractors – had relied on the eliminated defense to its detriment") (quoting *Olatunji*, 387 F.3d at 391); *Landgraf*, 511 U.S. at 282-283 & n.35 (amendment to Title VII that permitted recovery of compensatory and punitive damages for certain violations had retroactive effect because it attached a new legal consequence to past conduct, even though "concerns of unfair surprise and upsetting expectations [we]re attenuated" because "intentional employment discrimination" "ha[d] been

The Eleventh Circuit ignored how IIRIRA significantly altered the legal consequence of Ferguson's almost-decade-old conviction, focusing instead on her purported "decision" to go to trial rather than to plead guilty. But, again, nothing in the retroactivity test prescribed by this Court from *Landgraf* forward forbids consideration of the law's effect on a past conviction or criminal conduct. To the contrary, those are traditional foci of retroactivity analysis. *See Smith v. Doe, supra*. Moreover, the plain text of IIRIRA makes the "conviction" the operative act for depriving the immigrant of the previously available opportunity to seek a waiver of deportation. *See* 8 U.S.C. § 1229b(a)(3) (foreclosing relief for immigrants "convicted" of aggravated felonies). "Applying the familiar retroactivity analysis to the past event of conviction, rather than the past decision to go to trial, reveals that IIRIRA and AEDPA imposed an obvious additional legal consequence on those previously convicted of an aggravated felony, *i.e.*., certain, instead of possible, deportation." *Thom*, 369 F.3d at 167 (Underhill, J., dissenting).

Second, even if reliance were a critical element, there is every reason to believe that immigrants who chose to go to trial rather than accept plea bargains did so in reasonable reliance on the continuing availability of Section 212(c) relief. As this Court noted in *St. Cyr*, it is well-established that aliens charged with crime "factor the immigration consequences of conviction in deciding whether to plead *or* proceed to trial." 533 U.S. at 322 (emphasis added) (quoting *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999)). The consequences of conviction thus can be weighed as much

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unlawful for more than a generation"); *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994) (holding that Section 101 of the Civil Rights Act of 1991 has retroactive effect because it "creates liabilities that had no legal existence before the Act was passed" without considering reliance).

in deciding to reject as to accept a guilty plea. Prior to Section 212(c)'s repeal, immigrants could reasonably believe that going to trial was the best way to avoid deportation, when accepting a plea to a deportable defense would subject them to immediate risk of deportation; going to trial might avoid that prospect if the jury failed to convict; and even if the jury convicted, the immigrant would have no lesser right to apply for relief under Section 212(c) than she would if she had pled guilty. Similarly, individuals convicted after Congress foreclosed section 212(c) relief for those who served more than five years would have reasonably relied on the present state of the law in rejecting a plea bargain that required or risked a sentence that would render them ineligible under the 1990 statute.

Accordingly, there is no basis for the categorical rejection of *St. Cyr*'s application to those convicted after trial. Nor does it make sense to require immigrants to prove actual, subjective reliance. The Court required no such individualized showing in *St. Cyr*, even though it is entirely possible that some immigrants would have pled guilty for reasons entirely unrelated to the availability of Section 212(c) relief (especially those aliens whose equities made a waiver unlikely). Nor did the Court require courts to inquire into the minds of the defendants in *Landgraf* or *Hughes*. Furthermore, in practice, a subjective test is entirely unworkable given the rule against introducing plea offers into evidence, *see* Federal Rule of Evidence 410, the informality of such discussions in many state prosecutions, and the years if not decades that can elapse (as occurred here) between the decision to go to trial and the federal government's commencement of removal proceedings.

Third, the Eleventh Circuit's decision overlooks this Court's precedent holding that a single statutory provision cannot be construed to have different meanings based on the factual circumstances of the immigrant before the court. In *Clark v. Martinez*, 543 U.S. 371 (2005), this Court held that the Immigration and Nationality Act's detention provision, 8

U.S.C. § 1231(a)(6), must be given the same meaning when applied to excludable as well as deportable aliens. *Id.* at 378-381. Because the statutory text admitted of no distinction between those groups, the Court held that "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one." *Id.* at 378. In so holding, the Court acknowledged that its prior decision limiting the scope of detention for deportable aliens in *Zadvydas v. Davis*, 533 U.S. 678 (2001), had reserved the question whether its holding would extend to excludable aliens. *Clark*, 543 U.S. at 378. But the Court explained that, once confronted with the question of the provision's application to excludable aliens, the absence of any textual distinction compelled the "same answer." *Id.* at 379.

Likewise here, the government's effort to defend and leave in place the factually variable retroactivity rules now applied by the courts of appeals simply rehearses its failed effort in *Clark* to give "the *same* [statutory] provision a different meaning when [different] aliens are involved." 543 U.S. at 380. Whether Section 304(b) attaches a new legal consequence to pre-enactment convictions is a question of statutory construction and, as in *Clark*, nothing in "the operative language" of that provision "differentiat[es]" the scope of its operation or the legal effect of the repeal on an immigrant's ability to seek previously available discretionary relief based on how an immigrant's conviction was obtained. *Id.* at 378.

While the reliance interests of those convictions obtained through guilty pleas certainly informed the Court's judgment in *St. Cyr* – just as the legal and constitutional interests of deportable aliens informed the Court's original decision in *Zadvydas* – having decided that Section 304(b) does not apply to pre-enactment convictions obtained by plea, "the same answer" must apply to convictions obtained by trial. *Clark*, 543 U.S. at 379. Not only do convictions obtained through trial commonly implicate the same type of

reliance and other legal interests as guilty pleas, but beyond that, "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications" might implicate different analyses. *Id.* at 380. "The lowest common denominator, as it were, must govern." *Ibid.* Thus *St. Cyr*'s holding as a matter of statutory construction that Section 304(b) does not apply to a pre-IIRIRA conviction should control here because, whether obtained through plea or trial, Section 304(b) attaches new legal consequences to pre-enactment convictions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Opinion of the U.S. Court of Appeals for the Eleventh Circuit 1a

Decision of the Board of Immigration Appeals (Jan. 25, 2008) 30a

Oral Decision of the Immigration Judge (June 1, 2006) 33a

Decision of the Board of Immigration Appeals (June 11, 2002) 35a

Oral Decision of the Immigration Judge (May 18, 1999) 39a

8 U.S.C. § 1182(c) (1982) 41a

Illegal Immigration Reform and Immigrant Responsibility Act, § 304(b) 42a

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10806

Agency No. A35-730-532

SANDRA FERGUSON,

Petitioner,

vs.

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

March 31, 2009

Before BIRCH, HULL and FAY, Circuit Judges.

HULL, Circuit Judge:

This petition requires us to address a question that has divided the other circuits and presents an issue of first

impression in ours. Does IIRIRA's[1] repeal of the INA's § 212(c) waiver provision[2] have an impermissible retroactive effect on aliens, like Sandra Ferguson, who were convicted of deportable criminal offenses before IIRIRA's effective date?

Until April 1, 1997 (the effective date of IIRIRA's repeal of § 212(c)), Ferguson was eligible to apply for a § 212(c) deportation waiver. But the INS initiated removal proceedings in 1998–over a year after § 212(c) was repealed. Despite its repeal, Ferguson maintains that IIRIRA has an impermissible retroactive effect and does not bar her from applying for § 212(c) relief. The question in Ferguson's petition is whether she can take advantage of the now-repealed § 212(c).

The Supreme Court has addressed this question before. *See INS v. St. Cyr*, 533 U.S. 289 (2001). It said that because a plea agreement "involves a *quid pro quo* between a criminal defendant and the government," *id.* at 321, aliens who pled guilty to a deportable offense "almost certainly relied" on the availability of § 212(c) relief in deciding to plead guilty and forgo their right to trial, *id.* at 325. Therefore, the repeal of § 212(c) has an impermissible retroactive effect on such aliens, and they remain eligible for § 212(c) relief. *Id.*

But Ferguson did not plead guilty. She was convicted by a jury. And therein lies her dilemma.

After determining that we have jurisdiction to hear the petition, we conclude that IIRIRA's repeal of § 212(c) does not have an impermissible retroactive effect on Ferguson.

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-597.

[2] The Immigration and Nationality Act ("INA"), § 212(c), 8 U.S.C. § 1182(c).

I. FACTUAL BACKGROUND

Petitioner Sandra Ferguson emigrated from Jamaica to the United States, and on August 4, 1977, she was admitted as a lawful permanent resident. Although her residence was lawful, her subsequent behavior was not. On November 20, 1985, the State's Attorney of Cook County, Illinois charged her with possessing and intending to distribute 30 grams of cocaine. *See* Ill. Rev. Stat. Ch. 56.5 § 1401- A(2) (1983).[3]

On July 7, 1986, following a trial in the Circuit Court of Cook County, the jury convicted Ferguson. On September 9, 1986, the circuit court sentenced Ferguson to six years in prison. But she served only two years and nine months.

About ten years later, on July 5, 1998, the INS[4] served Ferguson with a Notice to Appear charging her with removability under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), for committing a controlled substances offense. On May 18, 1999, before the Immigration Judge ("IJ"), Ferguson admitted this charge in the Notice to Appear.[5] But she denied that she was removable.

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[3] The Illinois indictment contained the above citation. It appears to be consistent with the following citation: Ill. Comp. Stat., Ch. 56.5 § 1401(a)(2) (West 1988).

[4] On March 1, 2003, the INS ceased to exist. Its functions, now housed in the Department of Homeland Security ("DHS"), are divided principally among three agencies: U.S. Immigrations and Customs Enforcement, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services.

[5] The INS also charged Ferguson with removability for committing an aggravated felony. *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii); INA § 101(a)(43)(f), 8 U.S.C. § 1101(a)(43)(f). Ferguson denied that she committed an aggravated felony, and the INS subsequently withdrew the claim as it pertained to her removability charge. But, as we explain below, the INS (and later the DHS) maintained that her controlled substances offense qualified as an aggravated felony

The IJ found Ferguson removable, pursuant to INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), based on her admissions and the evidence of her felony drug conviction. The IJ found that "the nature of her conviction" made her ineligible for cancellation of removal under INA § 240(a), 8 U.S.C. § 1229b.[6] The IJ ordered her removed to Jamaica.

Ferguson appealed to the Board of Immigration Appeals ("BIA"). Ferguson argued that she was eligible for cancellation of removal under § 240(a) because, at the time of her conviction in 1986, her crime was not considered an "aggravated felony" under immigration law. The BIA rejected her § 240(a) argument. But it remanded, in light of *INS v. St. Cyr*, 533 U.S. 289 (2001), to determine whether Ferguson might be eligible for discretionary relief from the Attorney

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for purposes of determining whether Ferguson was eligible for cancellation of removal. *See* footnote 6 *infra*.

[6] An alien "convicted of any aggravated felony" is ineligible for cancellation of removal. 8 U.S.C. § 1229b(a)(3). *See Chuang v. U.S. Att'y Gen.*, 382 F.3d 1299, 1303 (11th Cir. 2004) ("IIRIRA§ 304(b) repealed INA § 212(c) and replaced it with a more restrictive provision in INA § 240(a) called 'cancellation of removal.' *See* 8 U.S.C. § 1229b. . . . § 304 of IIRIRA provided that cancellation of removal was not available to an alien convicted of any aggravated felony." (citation and quotation marks omitted)); *Mohammed v. Ashcroft*, 261 F.3d 1244, 1248 n.3 (11th Cir. 2001) ("Status as an 'aggravated felon' renders an alien ineligible for discretionary relief–called cancellation of removal–under 8 U.S.C. § 1229b."). The INA defines an "aggravated felony" as including a "drug trafficking crime (as defined in section 924(c) of Title 18)." INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). "[T]he term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act [("CSA")] (21 U.S.C. 801 *et seq.*). . . ." 18 U.S.C. § 924(c)(2). And the CSA, in turn, defines a "felony" as an offense for which "the maximum term of imprisonment authorized" exceeds one year. 18 U.S.C. § 3559(a).

That arduous maze of statutory interpretation all means that Ferguson was not entitled to cancellation of removal because her felony drug crime, for which she was sentenced to five years in prison, constituted an "aggravated felony."

General under INA § 240(a)'s predecessor–the now-repealed INA § 212(c), 8 U.S.C. § 1182(c).

Because the record was ambiguous as to whether Ferguson was convicted at trial or pled guilty, the BIA remanded to the IJ to figure it out. At an evidentiary hearing before the IJ, Ferguson admitted that she was convicted at trial. But she argued that she was still eligible for a deportation waiver because, at the time Congress repealed § 212(c) in 1996, she was still eligible to apply for such relief. In other words, she argued that the repeal of § 212(c) does not apply retroactively to those who were eligible to apply for such relief before the date of repeal.[7]

The IJ found that she was convicted at trial. Therefore, the IJ again determined that she was ineligible for a § 212(c) waiver and reinstated the removal order. Ferguson again appealed to the BIA and challenged the IJ's ruling on § 212(c) availability. Her appeal raised the same arguments that she made before the IJ.

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[7] Ferguson further argued that, pursuant to *Cunningham v. U.S. Att'y Gen.*, 335 F.3d 1262, 1267 (11th Cir. 2003), she was eligible for § 212(c) relief because the INS served her with an Order to Show Cause (the precursor to the Notice to Appear) while she was still in prison in 1986 (and before Congress repealed § 212(c)). The IJ rejected Ferguson's *Cunningham* argument because she had no documentation to support her assertion that the INS began deportation proceedings prior to the repeal of § 212(c).

The BIA affirmed. It determined that Ferguson had no proof that the INS served her with an Order to Show Cause in 1986. Here, Ferguson does not dispute the BIA's rejection of her claim as unsubstantiated by any evidence. Rather, Ferguson focuses her petition on whether § 212(c) applies to aliens who were convicted at trial prior to the date of § 212(c)'s repeal. Thus, Ferguson has abandoned her claim that she was served in 1986. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004) ("[T]he law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed.").

The BIA affirmed the IJ's decision "in its entirety." The BIA rejected Ferguson's § 212(c) argument. It determined that a federal regulation made Ferguson ineligible. The BIA pointed to 8 C.F.R. § 1212.3(f)(4) as support for its conclusion that only individuals who pled guilty prior to the change in the law are eligible for § 212(c) relief.[8] The BIA based its ruling on the "clear language" of the federal regulation and the absence of any Eleventh Circuit authority extending *St. Cyr* to trial-based convictions as opposed to guilty pleas.

Ferguson filed a petition for review with this Court. The petition requires us to answer two questions. First, do we have jurisdiction to hear Ferguson's challenge to the BIA's pretermition of her application for a § 212(c) deportation waiver? Second, does IIRIRA's repeal of § 212(c) relief have an impermissible retroactive effect on aliens, like Ferguson, who were convicted of deportable criminal offenses by a jury prior to IIRIRA's effective date?

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[8] 8 C.F.R. 1212.3(f) provides, in part:

(4) The alien has been charged and found to be deportable or removable on the basis of a crime that is an aggravated felony, as defined in section 101(a)(43) of the Act (as in effect at the time the application for section 212(c) relief is adjudicated), except as follows:

(i) An alien whose convictions for one or more aggravated felonies were entered pursuant to plea agreements made on or after November 29, 1990, but prior to April 24, 1996, is ineligible for section 212(c) relief only if he or she has served a term of imprisonment of five years or more for such aggravated felony or felonies, and

(ii) An alien is not ineligible for section 212(c) relief on account of an aggravated felony conviction entered pursuant to a plea agreement that was made before November 29, 1990; or

(5) The alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

II. JURISDICTION

This Court's jurisdiction to review Ferguson's removal order is limited. Congress has divested courts of "jurisdiction to review any final order of removal against an alien who is removable by reason of having committed," among other things, a controlled substances offense. *See* INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) ("[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title."). [9] And Ferguson does not contest that she is removable under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(A)(iii). But we retain jurisdiction to review "constitutional claims or questions of law raised upon a petition for review." INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D); *see Alvarez Acosta v. U.S. Att'y Gen.*, 524 F.3d 1191, 1195-96 (11th Cir. 2008); *Alexandre v. U.S. Att'y Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006) (exercising jurisdiction under § 1252(a)(2)(D) to review petitioner's legal argument as to eligibility for relief under § 212(c)); *Balogun v. U.S. Att'y Gen.*, 425 F.3d 1356, 1360 (11th Cir. 2005) (discussing legislative history of § 1252(a)(2)(D)).

Here, Ferguson raises a pure question of law. That is, she argues that IIRIRA's repeal of § 212(c) has an impermissible retroactive effect on aliens like herself. She asks us to extend the holding of *INS v. St. Cyr*, 533 U.S. 289, 326 (2001), to

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[9] Section 1182(a)(2)(A)(i)(III) includes a crime that involves "a violation of . . . any law of a State . . . relating to a controlled substance." Section 1227(B)(i) includes "a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." Under § 1252(a)(2)(C), our jurisdiction is limited to determining whether a petitioner is an (1) alien (2) who is removable (3) for a disqualifying offense. *Moore v. Ashcroft*, 251 F.3d 919, 922-23 (11th Cir. 2001).

aliens convicted after a trial. *Id.* (holding "that § 212(c) relief remains available to aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect").

This is not the first time that we have been presented with a similar legal issue. But the last time we were, a jurisdictional bar stood in our way. In *Brooks v. Ashcroft*, 283 F.3d 1268, 1274-75 (11th Cir. 2002), this Court concluded that we lacked jurisdiction to review "the purely statutory question" of whether AEDPA [10] and IIRIRA applied retroactively to bar the petitioner's eligibility for § 212(c) relief. Subsequently, Congress enacted 8 U.S.C. § 1252(a)(2)(D), which removes that jurisdictional bar and supersedes the jurisdictional part of *Brooks*. *See* the Real ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005) (authorizing judicial review of "questions of law"). Furthermore, Ferguson's petition does not question the IJ or the BIA's exercise of discretion. Rather, she challenges the BIA's interpretation of *St. Cyr*. We therefore have jurisdiction to address the pure question of law raised by Ferguson's petition.

III. *ST. CYR* AND IMPERMISSIBLE RETROACTIVITY

The outcome of this case turns largely on our interpretation of the Supreme Court's decision in *St. Cyr*. Therefore, we begin by recounting *St. Cyr*. Because the circuit courts are divided on this issue, we examine their approaches as well. We then examine what we have said, albeit in dicta, about *St. Cyr*. Lastly, we apply the law to Ferguson.

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[10] The Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, § 440(d), 110 Stat. 1214 (1996).

A. *INS v. St. Cyr*

INS v. St. Cyr addressed the way that two statutory amendments to the INA—namely, AEDPA and IIRIRA—impacted § 212(c), 8 U.S.C. § 1182(c).[11] Before AEDPA and IIRIRA, § 212(c) authorized the Attorney General, in her discretion, to waive an alien's deportation if the alien was a lawful permanent resident who had lived in the United States continuously for seven years. INA § 212(c), 8 U.S.C. § 1182(c).[12] Congress first began tinkering with § 212(c) relief with the Immigration Act of 1990. *See* Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (IMMACT-90). That Act

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[11] INA § 212(c) states:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . . Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

INA § 212(c), 8 U.S.C. § 1182(c).

[12] Although § 212(c), as written, applies only to excludable aliens (as opposed to deportable aliens), courts and the BIA have interpreted it to authorize any permanent resident alien with a lawful unrelinquished domicile of seven consecutive years to apply for a discretionary waiver from deportation if the basis of the removal has a statutory counterpart in exclusion under § 212(a). *See Farquharson v. U.S. Att'y Gen.*, 246 F.3d 1317, 1324-25 (11th Cir. 2001); *Yeung v. INS*, 76 F.3d 337, 338-41 (11th Cir. 1995); *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1457-59 (11th Cir. 1994). Thus, to be eligible for § 212(c) relief, Ferguson must show that the basis for removal—a controlled substance offense—has a comparable statutory basis for exclusion under § 212(a). *See Farquharson*, 246 F.3d at 1324-25; *Yeung*, 76 F.3d at 338-41; *Rodriguez-Padron*, 13 F.3d at 1457-59; *see also* 8 CFR § 1212.3(f)(5). The INS does not dispute that Ferguson has done that.

"amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years." *St. Cyr*, 533 U.S. at 297.

In 1996, Congress amended § 212(c) two more times. *See Chuang v. U.S. Att'y Gen.*, 382 F.3d 1299, 1302-03 (11th Cir. 2004) (summarizing impact of AEDPA and IIRIRA on § 212(c)). First, it passed AEDPA. Section 440(d) of that statute bars § 212(c) relief for aliens who committed a broad set of offenses, including a controlled substances offense. *See* 110 Stat. 1277 (amending 8 U.S.C. § 1182(c)). And in September of 1996, IIRIRA repealed § 212(c) relief altogether. *See* § 304(b), 110 Stat. 3009-597. In its place, Congress created a "cancellation of removal" procedure. *St. Cyr*, 533 U.S. at 297 (citing IIRIRA § 304(b), 110 Stat. 3009-594) (codified at 8 U.S.C. § 1229b).[13] IIRIRA § 304(b) stripped the Attorney General's authority to waive deportation, now called removal, for any alien convicted of an "aggravated felony." *Id.*

St. Cyr addressed whether an alien who was convicted of a deportable offense was still eligible for § 212(c) relief where (1) he was convicted of an aggravated felony in March of 1996, (2) deportation proceedings did not begin until April 10, 1997 (after both IIRIRA and AEDPA went into effect), and (3) he was otherwise eligible to apply for § 212(c) relief

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[13] 8 U.S.C. § 1229b(a)'s "cancellation of removal" provision provides:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien–
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

but for the retroactive application of IIRIRA and AEDPA. 533 U.S. at 315. Put differently, the question was whether IIRIRA's repeal of § 212(c) relief had an impermissible retroactive effect on aliens whose convictions were obtained through guilty pleas, notwithstanding the fact that they were eligible for § 212(c) relief at the time they pled guilty.

The Supreme Court said yes. Drawing on *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court held that IIRIRA had an impermissible retroactive effect on aliens "whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *St. Cyr*, 533 U.S. at 326.

The Supreme Court first explained that "[r]etroactive statutes raise special concerns." *Id.* at 315. It reasoned that the "presumption against retroactive legislation is deeply rooted in our jurisprudence" and "embodies a legal doctrine centuries older than our Republic." *Id.* at 316 (quotation marks omitted). And it warned that retroactive legislation has the power to "sweep away settled expectations suddenly and without individual consideration" and raises the specter that Congress "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.* at 315. Although Congress has the power to enact laws with retroactive effect, Congress must clearly indicate that it intended such a result. *Id.* at 316. Accordingly, "'congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.'" *Id.* at 315-16 (omission in original) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

Therefore, the first step in the impermissible-retroactive-effect determination is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively. *Id.* at 316. The Supreme Court held that IIRIRA failed that test. *Id.* at 319-20. But the absence of clear

intent did not end the Supreme Court's *Landgraf* analysis.

Rather, the Supreme Court instructed that even if Congress has not spoken clearly, courts must proceed to a second step to determine whether depriving removable aliens of consideration for § 212(c) relief produced an "impermissible retroactive effect" for aliens convicted pursuant to a guilty plea. *Id.* at 320. This second inquiry into whether a statute operates retroactively requires courts to make a "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 321 (quotation marks and citation omitted). "A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or *attaches a new disability, in respect to transactions or considerations already past.*" *Id.* (quotation marks and citations omitted) (emphasis added). The Supreme Court did not stop there. It added that "the judgment whether a particular statute acts retroactively 'should be informed and guided by "familiar considerations of fair notice, *reasonable reliance*, and settled expectations."'" *Id.* (quoting *Martin v. Hadix*, 527 U.S. 343, 358 (1999) (quoting *Landgraf*, 511 U.S. at 270)) (emphasis added).

Applying this framework to those who "entered into plea agreements with the expectation that they would be eligible for [§ 212(c)] relief," the Supreme Court in *St. Cyr* first determined that IIRIRA's repeal of "any possibility of § 212(c) relief . . . clearly attaches a new disability, in respect to transactions or considerations already past." *Id.* (quotations marks and citations omitted). To demonstrate a new disability to a past transaction or consideration, the Supreme Court explained that aliens reasonably rely on the possibility of obtaining § 212(c) relief in considering whether to waive their right to trial and plead guilty:

> Plea agreements involve a *quid pro quo* between a criminal defendant and the

> government. In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources. There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. Given the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.

Id. at 321-22 (quotation marks and citations omitted). The key "transaction" or "consideration already past" was the alien's decision to abandon his constitutional right to trial and plead guilty in reliance on the old § 212(c). *Id.* at 325. "Because respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.*

Accordingly, the Supreme Court held that "§ 212(c) relief remains available for aliens, like respondent, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *Id.* at 326. The Supreme Court did not directly address whether an alien who pled guilty had to show individualized reliance on § 212(c) in entering a guilty plea or whether the class of aliens who pled guilty reasonably relied

on § 212(c). But the tenor of *St. Cyr* as a whole appears to treat aliens who pled guilty before IIRIRA as a group of similarly-situated applicants eligible for such relief. *Id.* at 322 ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."); *id.* at 325-26 (concluding that St. Cyr "and other aliens like him" remain eligible for § 212(c) relief); *id.* at 325 ("Because respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forego their right to a trial . . . ."); *id.* at 323 ("Given the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.").[14] As noted earlier, Ferguson did not plead guilty, and she asks us to extend *St. Cyr* outside of the guilty plea context.

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[14] *See Wilson v. Gonzales*, 471 F.3d 111, 119 (2d Cir. 2006) (discussing *St. Cyr* and concluding the Supreme Court endorsed the categorical presumption that it would be impermissible to apply the repeal of § 212 retroactively to the category of aliens who pled guilty before IIRIRA); *Thaqi v. Jenifer*, 377 F.3d 500, 504 n.2 (6th Cir. 2004) (noting that "under *St. Cyr*, the petitioner need not demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissible retroactive effect; he need only be among a class of aliens whose guilty pleas 'were likely facilitated' by their continued eligibility for § 212(c) relief"); *see also Garcia-Echaverria v. United States*, 376 F.3d 507, 515 (6th Cir. 2004) (stating in dicta that "*St. Cyr* aids only those aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for [discretionary cancellation of removal] at the time of their plea under the law then in effect" (quotation marks and emphasis omitted) (alteration in original)).

B. Other Circuits' Approaches

The circuits are split on how to apply *St. Cyr* to aliens outside of the guilty plea context.

The majority of circuits to address the issue have held that IIRIRA does not have an impermissible retroactive effect on aliens who relied on § 212(c) relief in deciding to go to trial. *See Hernandez-Castillo v. Moore*, 436 F.3d 516, 520 (5th Cir. 2006); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1036-37 (7th Cir. 2004); *Rankine v. Reno*, 319 F.3d 93, 102 (2d Cir. 2003); *Chambers v. Reno*, 307 F.3d 284, 290-93 (4th Cir. 2002); *Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002) ("[A]pplication of the new statutory limitations on discretionary relief does not have an impermissible retroactive effect on those aliens who would have been eligible for discretionary relief when they were convicted of a felony after trial."); *see also Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1131 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2499 (2008) (indicating that, "[i]n our circuit, we have generally limited *St. Cyr* to the factual context of a guilty plea," and "[o]utside of the plea bargain context . . . we have declined to invalidate retroactive elimination of § 212(c) relief"); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (stating that unlike aliens who pled guilty, "aliens who elected a jury trial cannot plausibly claim that they would have acted any differently if they had known about [AEDPA's] § 440(d)").[15]

"[A]liens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty" because "none of [them] detrimentally

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[15] In *Saravia-Paguada*, the Ninth Circuit interpreted *Armendariz-Montoya* as classifying reliance on § 212(c) when an alien goes to trial as "*per se* unreasonable," and emphasized that the decision "reaffirmed a narrow reading of *St. Cyr* and excluded categorically claims for § 212(c) relief outside the guilty plea context." 488 F.3d at 1131.

changed his position in reliance on continued eligibility for § 212(c) relief." *Rankine*, 319 F.3d at 99. Such aliens "have pointed to no conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial." *Id.* at 100; *Hernandez-Castillo*, 436 F.3d at 520 (quoting *Rankine*);[16] *Chambers*, 307 F.3d at 291 ("[I]n contrast to aliens who plead guilty, Chambers [in proceeding to trial] made no decision that adversely impacted his immigration status."). "As the [Supreme] Court made clear, it was that reliance, and the consequent change of immigration status, that produced the impermissible retroactive effect of IIRIRA." *Rankine*, 319 F.3d at 100; *see Chambers*, 307 F.3d at 290 ("The key event in terms of *St. Cyr's* analysis . . . was the alien's decision to abandon his constitutional right to a trial and plead guilty to a deportable offense in reliance on prior law."); *Montenegro*, 355 F.3d at 1037 ("But this exception does not apply to aliens like Montenegro who chose to go to trial; such aliens did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief.");[17] *Mbea v. Gonzales*, 482 F.3d 276, 281 (4th Cir.

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[16] Indeed, aliens who choose to go to trial do not do so in reliance on the availability of § 212(c) relief. They do so to fight their criminal charges. *Rankine*, 319 F.3d at 99-100 (noting that *St. Cyr*'s rationale does not extend to such a "hollow" claim); *see also Domond v. INS*, 244 F.3d 81, 86 (2d Cir. 2001) ("[I]t cannot reasonably be argued that aliens committed crimes in reliance on a hearing that might possibly waive their deportation."); *Lara-Ruiz v. INS*, 241 F.3d 934, 945 (7th Cir. 2001) ("[I]t would border on the absurd to argue that an alien would refrain from committing crimes or would contest criminal charges more vigorously if he knew that after he had been imprisoned and deported, a discretionary waiver of deportation would no longer be available to him. Thus, Lara-Ruiz cannot seriously maintain that the application of any rule barring discretionary relief from removal or deportation would upset his settled expectations sufficiently to trigger the presumption against retroactivity.") (quotation marks and citation omitted).

[17] Under the the Seventh Circuit's approach, even though *St. Cyr* protects aliens who pled guilty, they must still demonstrate that they

2007) ("We held that IIRIRA's repeal of § 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial.").[18]

As noted, the Second Circuit has expressly refused to extend *St. Cyr* to aliens who proceeded to trial. *Rankine*, 319 F.3d at 102 ("Because we have not found a persuasive argument that the holding in *St. Cyr* can be extended to cover those aliens who were convicted at trial rather than pursuant to a plea, we conclude that the repeal of § 212(c) relief does not have an impermissibly retroactive effect when applied to petitioners."); *Chambers*, 307 F.3d at 290-93. Subsequently, in *Restrepo v. McElroy*, 369 F.3d 627, 634 (2d Cir. 2004), the Second Circuit "fine-tuned its *St. Cyr-Rankine* jurisprudence" and "held that under certain limited circumstances, an alien-defendant who was convicted pursuant to a jury trial prior to the enactment of AEDPA could still potentially be eligible for § 212(c) relief." *See Wilson v. Gonzales*, 471 F.3d 111, 120 (2d Cir. 2006). In *Restrepo*, the Second Circuit concluded that

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actually relied on the availability of § 212(c) in deciding to plead guilty. *United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), *cert. denied*, 129 S. Ct. 489 (2008).

[18] In another line of authority, the Fourth Circuit seems to reject actual reliance as a necessary component of the retroactivity analysis. *See Olatunji v. Ashcroft*, 387 F.3d 383, 392 (4th Cir. 2004) ("[F]ar from holding that reliance is the sine qua non of retroactivity, both *Chambers* and *Velasquez-Gabriel* said precisely the opposite, that even aliens who have not detrimentally relied on pre-IIRIRA law can sustain a claim that IIRIRA is impermissibly retroactive." (emphasis omitted)). But the impact of *Olatunji* is unclear as it did not involve § 212(c), but rather the retroactive application of a different IIRIRA provision (that rendered Olatunji "inadmissible" pursuant to a conviction). Id. at 386. As the Tenth Circuit noted, "there is tension between *Olatunji* and *Chambers*, but [we] observe that they construe different provisions of the INA. . . . This broad repudiation of reliance is potentially in conflict with the reasoning of *Chambers*, which gives reliance a central role in its analysis." *Hem v. Maurer*, 458 F.3d 1185, 1192 n.4 (10th Cir. 2006).

an alien may show detrimental reliance when he decides to "forgo the immediate filing of a 212(c) application based on the considered and reasonable expectation that he would be permitted to file a stronger application for 212(c) relief at a later time." 369 F.3d at 634-35. The Second Circuit noted that the

> undermining of this settled expectation represents a prototypical case of retroactivity. Just like the aliens in *St. Cyr*, who sacrificed something of value—their right to a jury trial, at which they could obtain outright acquittal—in the expectation that their guilty pleas would leave them eligible for 212(c) relief, an alien like Petitioner also sacrificed something—the shot at obtaining 212(c) relief by immediately filing an application—in order to increase his chances of obtaining such relief later on. Such an alien conformed his or her conduct according to the availability of relief, and therefore had settled expectations that would be severely upset, were the AEDPA to be applied retroactively.

Id. (quotation marks, citations, and footnote omitted). In other words, aliens in the Second Circuit can prove detrimental reliance, under the *St. Cyr* framework, by showing that they affirmatively chose to forego filing their § 212(c) application for discretionary relief in order to build up a better record and boost the odds that their applications would be granted. *Id.* In *Restrepo*, the Second Circuit remanded for the district court to determine in the first instance: (1) whether Restrepo must make an individualized showing of reliance instead of reaping the benefit of a categorical presumption of reliance; and (2) if so, whether Restrepo could make that showing. *Id.* at 638-39. Since *Restrepo*, the Second Circuit has required an "individualized showing of reliance" to prove such claims. *Wilson*, 471 F.3d at 122. "Merely knowing of the continued

availability of § 212(c) relief is not the equivalent to affirmative reliance in its continued availability." *Id.*

The Fifth Circuit follows the *Restrepo* approach. *See Carranza-De Salinas v. Gonzales*, 477 F.3d 200, 208-09 (5th Cir. 2007) ("We find the reasoning of the *Restrepo* Court persuasive and see no need to create a circuit split on this issue."). But outside of the guilty plea context, the Fifth Circuit, like the Second, requires a showing of individualized reliance as opposed to a categorical presumption of reliance. *Id.* at 205 ("After *Hernandez-Castillo*, this circuit requires an applicant who alleges continued eligibility for § 212(c) relief to demonstrate actual, subjective reliance on the pre-IIRIRA state of the law to be eligible for relief from its retroactive application."). Under this approach, "[b]ecause the reliance demonstrated must be actual, the determination of retroactive effect is made as to the individual applicant, not as to a group of similarly-situated applicants." *Id.*

The Tenth Circuit extends *St. Cyr* beyond the guilty plea context and rejects a requirement of actual, subjective reliance. *See Hem v. Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006). In *Hem*, the Tenth Circuit found that an alien shows objectively reasonable reliance on § 212(c) relief where she gives up her right to appeal her criminal conviction.[19] *Id.* But its approach is not limited to those who gave up their appeals. Its general approach is to determine "whether the class of persons affected by retroactive application of a statute had an

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[19] Under *Hem*, an alien does not show objective reliance by simply foregoing the right to appeal. Rather, the alien must also show that a successful appeal would have placed him "at risk of being sentenced to a sentence longer than 5 years . . . making him ineligible for § 212(c) relief." *Hem*, 458 F.3d at 1199. Indeed, Hem was sentenced to three years. Therefore, resentencing carried the risk of a sentence longer than five years, which would have shut the door on his hopes of § 212(c) relief. *See* footnote 22 *infra* (explaining IMMACT-90's five year bar).

objectively reasonable interest in the previous state of the law." *Id.* at 1200. "Aliens, like Hem, who were in a position in which the availability of § 212(c) relief would reasonably inform their decision to forego a constitutional right, would suffer 'new legal consequences to events completed before [the statute's] enactment,' *Landgraf*, 511 U.S. at 269-70, under IIRIRA § 304(b)." *Id.* at 1200-01.[20] Therefore, such aliens are eligible for § 212(c) relief.

The Third Circuit, on the other hand, does not require aliens to show reliance or a reliance interest—either objective or subjective—on § 212(c) relief and has concluded that IIRIRA's repeal of § 212(c) is impermissibly retroactive in that it attaches new legal consequences to an alien's criminal conviction. *See Atkinson v. Att'y Gen.*, 479 F.3d 222, 231 (3d Cir. 2007). Because the Third Circuit's approach substantially differs from that of the other circuits, and because Ferguson urges us to adopt it, we discuss it in some detail. In the Third Circuit's view, the Supreme Court "has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." *Id.* at 227-28. "[R]eliance is but one consideration in assessing

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[20] In *Hem*, the question was whether "[a]liens, like Hem, who were in a position in which the availability of § 212(c) relief would reasonably inform their decision to forego a constitutional right, would suffer new legal consequences to events completed before the statute's enactment under IIRIRA § 304(b)." *Hem*, 458 F.3d at 1200-01. The petitioner in *Hem* was able to prove that she was part of a class of "[a]liens who gave up their right to appeal their aggravated felony conviction when a successful appeal could have deprived them of § 212(c) eligibility." *Id.* at 1199; *see id.* at 1200 ("When a defendant, like Hem, proceeds to trial, is convicted, chooses not to pursue an appeal when that appeal could result in the loss of § 212(c) relief, and subsequently loses the availability of § 212(c) relief following the Attorney General's decision to apply IIRIRA § 304(b) retroactively, his right to appeal has been retroactively impaired."). And, therefore, the Tenth Circuit held that Hem was still eligible for § 212(c) relief.

whether a statute attaches new legal consequences to past events." *Id.* at 231. The Third Circuit reads Supreme Court precedent not as requiring that the alien must have relied on the old § 212(c), but rather as undertaking a "general analysis of the impact of the amendment, finding retroactivity improper because the amendment instituted a legal change that attached a new legal burden to the proscribed conduct." *Id.* at 228. "Impermissible retroactivity, as defined in *Landgraf*, does not require that those affected by the change in law have relied on the prior state of the law." *Id.* at 229.

Therefore, based on its interpretation of *St. Cyr* and *Landgraf*, the Third Circuit phrased the relevant question as only: "Does applying IIRIRA to eliminate the availability of discretionary relief under former section 212(c) attach new legal consequences to events completed before the repeal?" *Id.* at 230. It answered that question by using Atkinson's conviction as the event completed, noting that

> Atkinson's case presents a straightforward application of the retroactive effect test. IIRIRA has plainly attached new legal consequences to Atkinson's conviction. Prior to IIRIRA's enactment, Atkinson remained free to apply for a waiver under section 212(c) despite his conviction of an aggravated felony. After IIRIRA, he lost that right; applying basic principles of retroactivity, IIRIRA attached a new legal consequence to Atkinson's conviction: the certainty–rather than the possibility–of deportation. Such a change in legal consequences based on events completed before IIRIRA's enactment constitutes an impermissible retroactive effect.

Id. (citation omitted).[21] While the law of the circuits is not uniform, none of the other circuits has adopted the Third Circuit's approach.

C. Eleventh Circuit's Interpretations of *St. Cyr*

Although our Court has not squarely decided the retroactivity issue splitting the circuits, we have come close to doing so on two occasions. We have all but said that *St. Cyr*'s retroactivity analysis does not apply to aliens who were convicted after a trial–as opposed to a guilty plea–and that § 212(c) relief is, therefore, not available to such aliens. Here, we examine our two prior decisions.

In *Alexandre v. United States Attorney General*, 452 F.3d 1204, 1205 (11th Cir. 2006), this Court addressed the BIA's denial of Alexandre's "motion to reopen his deportation

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[21] In the Third Circuit's view, "[n]owhere in the Supreme Court's jurisprudence . . . has reliance become the *sine qua non* of the retroactive effects inquiry. Moreover, nothing in the *Landgraf* line of cases supports the theory that the limits of permissible retroactivity are different for one group–those who accept (or consider) a plea agreement–than they are for another–those who exercise their constitutional right to a trial." *Atkinson*, 479 F.3d at 231 (citation omitted).

The Fourth Circuit in *Chambers* expressly rejected the view, taken by the Third Circuit, that the repeal of § 212(c) creates "new legal consequences." 307 F.3d at 293. Whereas the Third Circuit identified the relevant past conduct as the alien's conviction (when determining that IIRIRA imposes "new legal consequences" on that act), the Fourth Circuit treated the relevant past conduct as the "*decision to go trial*." *Id.* The Fourth Circuit also reasoned that in *St. Cyr*, the alien's decision to plead guilty "immediately changed his status from non-deportable to deportable." *Id.* at 290. In contrast, an alien like Chambers–who did not plead guilty–made "no decision that adversely impacted his immigration status." *Id.* at 291. "IIRIRA did not change the impact of Chambers' *decision to go to trial* on his immigration status. . . . Chambers' decision to go to trial did not render him deportable or subject him to certain deportation, regardless of whether pre- or post-IIRIRA law is applied." *Id.* at 293.

proceedings in order to permit him to apply for relief under former INA § 212(c)." The BIA denied the motion and concluded that Alexandre was ineligible for § 212(c) relief. *Id.* Alexandre (1) had been convicted of drug charges (considered an "aggravated felony"), (2) following a 1989 jury trial, and (3) had served five years of his sentence. *Id.* Relying on the five-year bar in the Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 ("IMMACT-90"),[22] the BIA determined that Alexandre was precluded from seeking § 212(c) relief. *Id.* at 207.

This Court denied Alexandre's petition for review of the BIA's denial of his motion to reopen. *Id.* at 1207. We noted that Alexandre was convicted in 1989 and that when deportation proceedings began in 1994 "he had served at least 5 years of his sentence." *Id.* We stated that "the retroactivity rationale of *St. Cyr* does not apply to IMMACT-90." *Id.* "Thus, at the time of his deportation proceedings, [Alexandre] was ineligible for § 212(c) relief because of the five-year bar." *Id.* Citing federal regulation 8 C.F.R. § 1003.44(a) we also stated that "§ 212(c) relief is not available to aliens who were convicted after a trial instead of on a guilty plea." *Id.*

Although Alexandre argued that IMMACT-90's five-year bar produced "an impermissible retroactive effect because he committed his crime before the statute including [the bar] was passed," this Court determined that his "argument was resolved in [his] initial appeal before the BIA, and *for that reason it [was] not properly before us*" in the petition for review of the denial of his motion to reopen. *Id.* (emphasis added). We also noted, albeit in dictum, that "[e]ven if the

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[22] IMMACT-90 "provided that an alien convicted of an aggravated felony who had served at least five years of his sentence could not seek a waiver of inadmissibility under then INA § 212(c)." *Alexandre*, 452 F.3d at 1207.

retroactivity rationale of *St. Cyr* did apply to IMMACT-90, it would not apply to Alexandre because he did not plead guilty to his drug trafficking charges, but instead proceeded to trial and was convicted by a jury." *Id.*[23]

Alexandre is instructive. But it does not squarely resolve the issue presented in this petition. *Alexandre* involved a different statute that did not repeal all of § 212(c). And we stated quite clearly, "the retroactivity rationale of *St. Cyr* does not apply to IMMACT-90." *Id.* Admittedly, *Alexandre* did state that "§ 212(c) relief is not available to aliens who were convicted after a trial instead of on a guilty plea." *Id.* However, our comments on the retroactivity issue and the scope of *St. Cyr* were classic dicta because we explicitly noted that the retroactivity issue was "not properly before us." *Id.*

As we noted earlier, the same retroactivity issue was presented in *Brooks v. Ashcroft*, 283 F.3d 1268, 1273-74 (11th Cir. 2002), but a jurisdictional bar, now removed by 8 U.S.C. § 1252(a)(2)(D), prevented us from resolving it.[24] 283 F.3d at 1271-73. Although *Brooks* does not control the discrete retroactivity issue now before us, it also sheds light on our interpretation of *St. Cyr*.

In *Brooks*, we addressed and rejected two constitutional challenges–under the Sixth Amendment and the Equal

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[23] We further mentioned that "[e]ven without the five-year bar, the plain language of § 1003.44 also precludes those who did not plead guilty from relief." *Alexandre*, 452 F.3d at 1207.

[24] As we explained in Part II. *supra*, the Real ID Act of 2005 subsequently conferred federal courts with jurisdiction to address pure legal issues in the removal context. *See* 8 U.S.C. § 1252(a)(2)(D). Therefore, *Brooks* has only been superseded as to its jurisdictional component, not its endorsement of the constitutionality of the *St. Cyr* framework. *Brooks*, 283 F.3d at 1272- 73, *superseded in part by* 8 U.S.C. § 1252(a)(2)(D).

Protection Clause–to applying IIRIRA's repeal of § 212(c) to aliens, like Brooks, who were convicted before IIRIRA's effective date. First, Brooks argued that applying IIRIRA "would impermissibly penalize him for exercising his Sixth Amendment rights." Brooks argued that since *St. Cyr* authorized those who pled guilty to apply for § 212(c) relief, applying it to an alien convicted after a trial necessarily penalized him for exercising his Sixth Amendment right to trial. *Id.*

This Court rejected Brooks's Sixth Amendment challenge. Nothing in *St. Cyr* changed the fact that Brooks "was given the opportunity to be heard, the right to examine witnesses against him, the right to offer testimony, and the right to be represented by counsel." *Id.* We were "thus hard-pressed to see how his Sixth Amendment rights were violated." *Id.* We quoted *St. Cyr* for the proposition that alien defendants are "acutely aware of the immigration consequences of their convictions." *Id.* at 1274 (quoting *St. Cyr*, 533 U.S. at 322). We concluded that "Brooks weighed his options and was given a full trial, and was thus accorded his Sixth Amendment rights." *Id.*

This Court also rejected Brooks's Equal Protection challenge. *Id.* Brooks argued that "it violates the Equal Protection Clause to apply IIRIRA § 304(b) retroactively to aliens whose convictions preceded the enactment of IIRIRA, but yet preventing such retroactive application against aliens who pled guilty as in *St. Cyr*." *Id.* But we found that there was a rational basis for distinguishing between the two groups. *Id.* And we quoted approvingly *St. Cyr*'s explanation of why plea agreements involve a quid pro quo, tit-for-tat exchange, between a criminal defendant and the government. Therefore, we concluded that Brooks's Equal Protection claim had "no merit." *Id.* Nonetheless, *Brooks* did not directly address whether IIRIRA's repeal of § 212(c) had an impermissible retroactive effect–the question that Ferguson raises here.

D. Ferguson's Petition

Ferguson argues that the BIA erred by limiting *St. Cyr* exclusively to guilty pleas and urges us to reject any reliance requirement for the purpose of determining whether IIRIRA's repeal of § 212(c) impermissibly applies retroactively to aliens like herself.[25] Ferguson argues that because IIRIRA impermissibly attached new legal consequences and inflicted new legal disabilities on her past conviction, she is still eligible to apply for § 212(c) relief. And she asks us to adopt an approach akin to the Third Circuit's.

The government, on the other hand, asks that we narrowly interpret the *St. Cyr* retroactivity shield as only applicable to aliens who pled guilty. It points out that the Executive Office for Immigration Review has promulgated regulations consistent with this narrow interpretation of *St. Cyr*.[26] The government contends that only those aliens who pled guilty can show reliance interests strong enough to warrant tempering the retroactive effects of IIRIRA's repeal of § 212(c).

We decline to adopt the approach urged by Ferguson. In our view, reliance is a core component of *St. Cyr*'s retroactivity analysis as it applies to aliens challenging the application of IIRIRA's repeal of § 212(c). For starters, we do not write on a blank slate. In *Alexandre*, we interpreted the "retroactivity rationale of *St. Cyr*" as inapplicable where the alien "did not plead guilty to his drug trafficking charge, but

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[25] We review the BIA's statutory interpretation *de novo*. *Sarmiento v. U.S. Att'y Gen.*, 381 F.3d 1277, 1279-80 (11th Cir. 2004). We owe no deference when the issue involves the retroactive application of a statute. *Id.* at 1280.

[26] Exec. Office for Immigration Review, Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 69 Fed.Reg. 57,826 (Sept. 28, 2004) (codified at 8 C.F.R. pts. 1003, 1212, 1240 (2006)).

instead proceeded to trial and was convicted by a jury." 452 F.3d at 1207. Although this dictum is not binding, we recognize it as a persuasive reason to reject Ferguson's argument that reliance should not bear on a retroactivity analysis in this context.

Second, our reading of *St. Cyr* bolsters our conclusion. To take an alternate view would render the Supreme Court's reasoning and analytical approach— explained in *St. Cyr*— superfluous by half. Were Ferguson correct, the Supreme Court's discussion of reliance in *St. Cyr* was a wholly unnecessary and gratuitous academic exercise. And the notion that IIRIRA "plainly attached new legal consequences to [Ferguson's] conviction," *Atkinson*, 479 F.3d at 230, was so plain that it was lost on the Supreme Court. The fact that it is possible to advance a retroactivity claim in some circumstances without a showing of reliance does not give us carte blanche to discard the Supreme Court's pronouncements on the matter.

Even if reliance is not the only basis for determining whether a statute is impermissibly retroactive, *see St. Cyr*, 533 U.S. at 321 n.46, the retroactivity analysis is still "informed and guided by considerations of fair notice, reasonable reliance, and settled expectations," *id.* That is, just because an alien is not required to demonstrate reliance does not mean that she may exclusively rely on other portions of the Supreme Court's retroactivity jurisprudence and pretend reliance is irrelevant.[27]

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[27] In *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33 (2006), the Supreme Court addressed whether INA § 241(a)(5) had an impermissible retroactive effect on aliens who "reentered the United States before IIRIRA's effective date." The Supreme Court held that *St. Cyr*'s retroactivity rationale, which involved the *quid pro quo* nature of a guilty plea as it applied to eligibility for § 212(c) relief, did not address the concerns present when § 241(a)(5) applies. *Id.* at 44. "[Section 241(a)(5)]

We recognize the Supreme Court has refused to adopt a rigid, single test for determining whether a statute has an impermissible retroactive effect. *See St. Cyr*, 533 U.S. at 321 n.46. However, it strikes us as more reasonable to focus on the reliance elements, as laid out in *St. Cyr*, than other elements of a retroactivity analysis, put forth in cases such as *Landgraf*. *St. Cyr* confronted the exact statutory provision at issue here—§ 212(c)—and laid out a sensible framework for deciding whether IIRIRA's repeal of § 212(c) relief has an impermissible retroactive effect. In our view, the *St. Cyr* approach is entitled to more weight than a decision concerning the retroactivity analysis of a completely different statute. *See Landgraf*, 511 U.S. at 250; *see also Cohens v. Virginia*, 19 U.S. 264 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.").

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applies to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country." *Id.* Unlike the impermissible effects that flow from the decision to rely on a guilty plea in the § 212(c) context, "[i]t is. . . the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out." *Id.*; *id.* at 44 n.10 ("Fernandez-Vargas's claim to such relief was contingent, and it was up to him to take some action that would elevate it above the level of hope. . . . Fernandez-Vargas never availed himself of them or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement."). Although *Fernandez-Vargas* does not control the discrete legal issue before us, we mention it because its reading of *St. Cyr* is consistent with our own. Here, Ferguson does not argue that she relied on some completed act that she is helpless to undo. A jury verdict is not an intentionally committed "past act" that Ferguson committed. It is a byproduct of one's decision to engage in criminal conduct.

We therefore hold that reliance is a component of the retroactivity analysis as it applies to aliens, deportable for criminal offenses, who wish to show that IIRIRA's repeal of § 212(c) has an impermissible retroactive effect. Here, Ferguson did not plead guilty but was convicted by a jury. And aside from her decision to go to trial, she points to no other "transactions" or "considerations already past" on which she relied. Joining the majority of circuits, we decline to extend *St. Cyr* to aliens who were convicted after a trial because such aliens' decisions to go to trial do not satisfy *St. Cyr*'s reliance requirement. Therefore, § 212(c) relief is not available to such aliens.[28] *See Hernandez-Castillo*, 436 F.3d at 520; *Montenegro*, 355 F.3d at 1037; *Rankine*, 319 F.3d at 102; *Chambers*, 307 F.3d at 290-93; *Dias*, 311 F.3d at 458; *see also Saravia-Paguada*, 488 F.3d at 1131; *Armendariz-Montoya*, 291 F.3d at 1121. Accordingly, Ferguson's petition for relief is **DENIED**.

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[28] We express no opinion on whether aliens may prove an impermissible retroactive effect by demonstrating reliance on other "transactions" or "considerations already past" that do not involve a criminal conviction or the decision to go to trial. That issue is not before us in this particular appeal. Nor do we express a view on the availability of § 212(c) relief in circumstances where an alien (convicted after trial) makes an individualized showing of reliance on § 212(c) and affirmatively chooses to wait to file a § 212(c) application to build up a better record. *See Restrepo*, 369 F.3d at 634; *Carranza-De Salinas*, 477 F.3d at 208-210. Here, Ferguson has not claimed such reliance.

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A35 730 532 - Miami, FL
Date: Jan. 25 2008

In re: SANDRA *FERGUSON*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Philip M. Zyne, Esquire

APPLICATION: Waiver of inadmissibility under section 212(c) of the Act

ORDER:

PER CURIAM. This case was last before the Board on June 11, 2002, when we affirmed the May 18, 1999, decision of the Immigration Judge as to the respondent's removability and ineligibility for cancellation of removal, but remanded for the Immigration Judge to determine whether the respondent was eligible to apply for a waiver under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), pursuant to the United States Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). The respondent, a native and citizen of Jamaica, appeals from the June 1, 2006, decision of the Immigration Judge finding her ineligible for relief under former section 212(c), and reinstating the prior order of removal dated May 18, 1999. The appeal will be dismissed.

We affirm the Immigration Judge's decision in its entirety, and add the following comments. On appeal, the respondent raises two arguments. The first, that the failure of federal regulations to extend *St. Cyr* eligibility for section 212(c) relief to aliens who were convicted after trial is

contrary to law and should not be followed in cases arising within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, is unpersuasive. In the absence of a countervailing precedent decision of the Eleventh Circuit (under whose jurisdiction the present case arises), the clear language of 8 C.F.R. § 1212.3(f)(4) precludes our acceptance of such argument. *See Matter of Fede*, 20 I&N Dec. 35 (BIA 1989) (stating that regulations promulgated by the Attorney General are binding on the Board and Immigration Judges); *see also Matter of Cortez*, 16 I&N Dec. 289 (BIA 1977) (noting that it is settled that the Board and Immigration Judges lack jurisdiction to rule on the constitutionality of immigration statutes and regulations).

We are also unpersuaded by the respondent's second argument, that she should be found eligible to apply for a section 212(c) waiver pursuant to *Cunningham v. U.S. Atty. Gen.*, 335 F.3d 1262 (11th Cir. 2003). The respondent claims to have been served with an Order to Show Cause ("OSC") in 1986, which under *Cunningham* would allow her to apply for a section 212(c) waiver. However, the respondent was subsequently unable to provide any proof in support of her contention. While the Department of Homeland Security ("DHS") initially conceded eligibility on this point (Tr. at 20), the Immigration Judge subsequently allowed the DHS to withdraw such concession (Tr. at 75), which was determined to have been made in error.[29] We find respondent's argument,

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[29] At the February 2, 2006, hearing, the Immigration Judge stated that the prior DHS attorney who had earlier made such concession "was wrong in his assessment, and I was wrong in accepting his statement at the time" (Tr. at 75). While the transcript reflects the belief of respondent's counsel that the DHS had relied on evidence in its file of the issuance of the 1986 OSC (Tr. at 73), counsel admits in his appellate brief that "subsequently, it was determined that there was no evidence in the file showing that an Order to Show Cause had ever been issued." Respondent's Appeal Brief at 10.

that her being served with an OSC in 1986 is "the only logical assumption" because "[i]t is inconceivable to believe" that she would be released without one after completing her sentence, to be impermissibly speculative.

Accordingly, the appeal is dismissed.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Miami, Florida

File A 35 730 532
Date: June 1, 2006

In the matter of:
SANDRA FERGUSON, Petitioner
IN REMOVAL PROCEEDINGS

CHARGE: Section 237 (a) (2) (B) (i).
APPLICATION: Waiver under Section 212(c).

ON BEHALF OF THE RESPONDENT:
Phillip Simon, Esquire

ON BEHALF OF THE GOVERNMENT:
David J. Kelly, Esquire
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

This case comes before the Court on a remand from the Board of Immigration Appeals. It appeared on May 18, 1999. This Court had rendered a decision, finding the respondent removal as charged and also finding her ineligible for cancellation of removal under Section 240A(a) of the Immigration and Nationality Act (hereinafter the Act) and ordering her removed from the United States.

The case was appealed to the Board of Immigration Appeals which, on June 11, 2002, rendered its findings in which it sustained the decision of this Court, but remanded the case for further proceedings, pursuant to *INS v. St. Cyr*, 533 U.S. 289 (2000), to determine whether the respondent was eligible for relief in the form of a waiver under old Section 212(c) of the Act as, according to the Board, the commissioned documents contained in the record of this case did not clearly reflect whether or not said convictions were pursuant to a guilty plea. If they had been pursuant to a guilty plea, then the respondent would have been statutorily eligible, under *INS v. St. Cyr*, to apply for a waiver under Section 212(c).

The Court held an evidentiary hearing in this case on the respondent's application for 212(c), which was filed with the Court pursuant to the Board remand and in that hearing the respondent, under oath, testified and admitted that her conviction was not the result of plea agreement, but that she had actually gone to trial. The parties agree that this is so. And that being the case, the respondent is not eligible for a waiver under Section 212(c) pursuant to *INS v. St. Cyr*. The Court will therefore pretermit said application and restate its order of removal.

The following orders will issued:

ORDERS

IT IS HEREBY ORDERED that the application for a waiver under Section 212(c) be pretermited and denied.

IT IS FURTHER ORDERED that the respondent be removed and deported to Jamaica.

PEDRO A. MIRANDA
Immigration Judge

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A35 730 532 – Miami
Date: June 11, 2002
In re: SANDRA *FERGUSON*
IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT:
Philip M. Zyne, Esquire
ON BEHALF OF SERVICE:
Amy Isackson-Rojas
Assistant District Counsel
CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act
8 U.S.C. § 1227(a)(2)(A)(iii) -
Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act
8 U.S.C. § 1227(a)(2)(B)(i) -
Convicted of controlled substance violation

APPLICATION: Cancellation of removal

The respondent appeals from the Immigration Judge's May 18, 1999, decision finding her ineligible for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and ordering her removed from the United States. The respondent's request for oral argument is denied. The respondent's appeal will be

dismissed in part, but the record will be remanded.

The respondent is a native and citizen of Jamaica who entered the United States as an immigrant in August 1977. The record reflects that she was convicted on July 7, 1986, for delivery of a controlled substance, to wit: cocaine, in violation of Illinois Statute Chapter 56.5 § 1401(a)(2), and sentenced to 6 years in prison (Exh. 3). Although she challenges the admission of evidence relating to this conviction, she has admitted she was convicted of this offense (Tr. at 22), and she concedes on appeal that she is removable as charged due to this conviction (Respondent's Brief at 3). We therefore do not address this challenge.

The respondent further argues on appeal that the Immigration Judge erred in finding her convicted of an aggravated felony and therefore ineligible to apply for cancellation of removal. We find no error in the Immigration Judge's conclusion that the 1986 conviction is an aggravated felony. Section 101(a)(43)(B) of the Act states that a "drug trafficking crime," as defined in 18 U.S.C. § 924(c), is an aggravated felony. Section 924(c)(2) defines a drug trafficking crime as any felony punishable under the Controlled Substances Act, or one of the other federal statutes listed. Disposition of this issue is guided by our recent precedent decision in *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002), where we held that the determination of whether a state drug offense constitutes a "drug trafficking crime" must be made by reference to pertinent authority from the relevant circuit court of appeals. Accordingly, we turn to an examination of the pertinent law of the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this proceeding arises.

The Eleventh Circuit has agreed with other circuit courts that "for a drug offense to come within 18 U.S.C. § 924(c)(2), and hence to fit within the definition of aggravated felony, two criteria must be met: (1) the offense must be punishable under one of the three enumerated statutes, and (2) the

offense must be a felony." *See United States v. Simon*, 168 F.3d 1271 (11th Cir. 1999), *cert. denied*, 528 U.S. 844 (1999). The respondent's conviction for delivery of a controlled substance is punishable under the Controlled Substances Act. *See* 21 U.S.C. § 841(a) (penalizing distribution of a controlled substance); *see also* 21 U.S.C. § 802 (the term "distribute" means to "deliver" a controlled substance). Furthermore, the Eleventh Circuit concluded that a crime is a felony within the meaning of section 924(c)(2) if it is classified as a felony by the jurisdiction in which the perpetrator was convicted. *See United States v. Simon, supra.* The respondent's offense is classified as a felony in Illinois (Exh. 3). *See* Ill. Stat. Ch. 56.5 § 1401(a). Thus, under *Simon*, the respondent's conviction is considered a "drug trafficking crime" within the meaning of section 924(c)(2), and is therefore an aggravated felony under section 101(a)(43)(B) of the Act. The respondent is consequently ineligible for cancellation of removal. *See* section 240A(a)(3) of the Act.

Nevertheless, remand of this matter is appropriate under the United States Supreme Court's recent decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), in which the Court held that section 212(c) relief remains available for aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for section 212(c) relief at the time of their plea under the law then in effect. The conviction documents contained in the record do not clearly reflect whether or not the respondent's conviction was pursuant to a guilty plea (Exh. 3). *See generally Brooks v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002) (finding that under *St.Cyr*, a defendant who pleads guilty in a criminal matter is not similarly situated to a defendant who does not enter a guilty plea). Thus, it is appropriate to remand the record for the submission of evidence regarding her possible eligibility for relief under section 212(c). Accordingly, the respondent's appeal will be dismissed in part, but the record will be remanded for further proceedings

consistent with the foregoing opinion.

ORDER: The appeal is dismissed with regard to removability and eligibility for cancellation of removal.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Miami, Florida

File A 35 730 532
Date: May 18, 1999

In the matter of:
SANDRA FERGUSON, Petitioner
IN REMOVAL PROCEEDINGS

CHARGE: Section 237 (a) (2) (B) (i).
APPLICATION

ON BEHALF OF THE RESPONDENT:
Anis Saleh, Esquire

ON BEHALF OF SERVICE:
Catherine Muhletaler, Esq.
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Jamaica who was admitted into the United States on or about August 4th, 1977 as an immigrant. She was convicted on July 7th, 1986 in the Circuit Court for Cook County, Illinois, for the offense of delivery of a controlled substance, to wit: cocaine in violation of Illinois statute 56.5-1401-A(2), and was placed in removal proceedings through a Notice to Appear dated July 5th, 1998,

as amended by additional charges of inadmissibility filed by the Immigration and Naturalization Service (hereinafter the Service) on April 6, 1999. Based on the respondent's admissions, as well as the conviction records submitted by the Service, and marked as group Exhibit 3, it appears that the respondent was, in fact, convicted as alleged and, having been thus convicted, it appears that she is, in fact, removable under Section 237(a)(2)(b)(i) of the Immigration and Nationality Act, as amended, in that anytime after admission she has been convicted of a violation of a state, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana. Since the respondent has been convicted for delivery of a controlled substance, to wit, cocaine, it appears that she is, in fact, removable under Section 237(a)(2)(b)(i) of the Immigration and Nationality Act and the Court will so find.

Given the nature of the respondent's conviction, it appears that she, at this time, is not eligible for relief from removal, even though she is an immigrant and has been a lawful, permanent resident of this country since August 4th of 1977. Because of the nature of her convictions, she is ineligible for relief in the form of cancellation of removal and it does not appear to the Court that she is eligible for any other form of relief, nor is she applying for relief. The Court, therefore, has no choice but to order that the respondent be removed from the United States as follows.

ORDER

IT IS HEREBY ORDERED that the respondent be removed and deported to Jamaica based on the charges contained in the Notice to Appear.

PEDRO MIRANDA
U.S. Immigration Judge

Title 8. Aliens and Nationality

Chapter 12. Immigration and Nationality

Subchapter II. Immigration

Part II. Admission Qualifications for Aliens; Travel Control of Citizens and Aliens

§ 1182. Inadmissible Aliens

(c) Nonapplicability of subsection (a)(1) to (25), (30), and (31)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

Illegal Immigration Reform and Immigrant Responsibility Act

Pub. L. No. 104-208

Sept. 30, 1996

Sec. 304. REMOVAL PROCEEDINGS; CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS; VOLUNTARY DEPARTURE (REVISED AND NEW SECTIONS 239 TO 240C).

(b) REPEAL OF SECTION 212(c).–Section 212(c) (8 U.S.C. 1182(c)) is repealed.

No. 09-263

In the Supreme Court of the United States

SANDRA FERGUSON, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress repealed Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which provided for a discretionary waiver of deportation, and replaced it with another form of discretionary relief not available to aliens convicted of certain crimes, including aggravated felonies and controlled-substance offenses. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) did not apply retroactively to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The questions presented are:

1. Whether this Court's holding in *St. Cyr* applies to an alien who was convicted of a controlled-substance offense after trial, and who therefore did not relinquish her right to a trial in reliance on potential eligibility for a waiver under Section 212(c).

2. Whether detrimental reliance is necessary to establish the retroactive effect that this Court has construed the repeal of the availability of relief under former Section 212(c) to avoid, and, if so, whether actual or objectively reasonable reliance is required.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Aguilar v. *Mukasey*, 128 S. Ct. 2961 (2008) 6
Alvarez-Aceves v. *Fasano*, 150 Fed. Appx. 596 (9th Cir. 2005) 15
Appel v. *Gonzales*, 146 Fed. Appx. 175 (9th Cir. 2005), cert. denied, 549 U.S. 1051 (2006) 16
Armendariz-Montoya v. *Sonchik*:
291 F.3d 1116 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003) 13, 15
539 U.S. 902 (2003) 6
Atkinson v. *Attorney Gen.*, 479 F.3d 222 (3d Cir. 2007) 10, 11, 12, 14, 1
Berishaj v. *Gonzales*, 238 Fed. Appx. 275 (9th Cir. 2007) 16
Canto v. *Holder*, No. 08-4272, 2010 WL 308795 (7th Cir. Jan. 28, 2010) 12, 13
Carranza-De Salinas v. *Gonzales*, 477 F.3d 200 (5th Cir. 2007) 16
Cerbacio-Diaz v. *Gonzales*, 234 Fed. Appx. 583 (9th Cir. 2007) 17
Chambers v. *Reno*, 307 F.3d 284 (4th Cir. 2002) 10 15
Clark v. *Martinez*, 543 U.S. 371 (2005) 7, 8

Cases—Continued: Page

Crump v. *Reno*, 130 Fed. Appx. 500 (2d Cir. 2005) 15
Cruz-Garcia v. *Holder*, 129 S. Ct. 2424 (2009) 6
Cruz-Garcia v. *Mukasey*, 285 Fed. Appx. 446 (9th Cir. 2008), cert. denied, 129 S. Ct. 2424 (2009) ... 17
Dias v. *INS*, 311 F.3d 456 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003) 10
Esquivel v. *Mukasey*, 543 F.3d 919 (7th Cir. 2008) 17
Evangelista v. *Ashcroft*, 359 F.3d 145 (2d Cir. 2004), cert. denied, 543 U.S. 1145 (2005) 16
Evangelista v. *Attorney Gen.*, 176 Fed. Appx. 306 (3d Cir. 2006) 16
Fernandez-Vargas v. *Gonzales*, 548 U.S. 30 (2006) 9
Gallardo v. *Mukasey*, 279 Fed. Appx. 484 (9th Cir. 2008) 17
Garcia v. *Fasano*, 62 Fed. Appx. 816 (9th Cir. 2003) 16
Garcia-Ortiz v. *Gonzales*, 194 Fed. Appx. 513 (10th Cir. 2006) 17
Haque v. *Holder*, 312 Fed. Appx. 946 (9th Cir. 2009) 16
Hem v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006) .. 10, 14, 16
Hernandez-Castillo v. *Gonzales*, 549 U.S. 810 (2006) 6
Hernandez-Castillo v. *Moore*, 436 F.3d 516 (5th Cir.), cert. denied, 549 U.S. 810 (2006) 10
Hernandez de Anderson v. *Gonzales*, 497 F.3d 927 (9th Cir. 2007) 10, 14
Hughes Aircraft Co. v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) 7
INS v. *St. Cyr*, 533 U.S. 289 (2001) 2, 3, 5, 7, 8, 11, 12
Jaw-Shi Wang v. *Ashcroft*, 71 Fed. Appx. 624 (9th Cir. 2003), cert. denied, 540 U.S. 1128 (2004) 17

Cases—Continued: Page

Johnson v. *Holder*, 564 F.3d 95 (2d Cir. 2009), petition for cert. pending, No. 09-7909 (filed Oct. 8, 2009) 15

Jurado-Gutierrez v. *Greene*, 190 F.3d 1135 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000) 13

Kelava v. *Gonzales*, 434 F.3d 1120 (9th Cir.), cert. denied, 549 U.S. 810 (2006) 16

Kellermann v. *Holder*, No. 08-3927, 2010 WL 252264 (6th Cri. Jan. 25, 2010) 10

LaGuerre v. *Reno*, 164 F.3d 1035 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000) 13, 14

Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 6, 8

Lawrence v. *Ashcroft*, 540 U.S. 910 (2003) 6

Lopez-Lopez v. *Mukasey*, 285 Fed. Appx. 440 (9th Cir. 2008) 15

Lovan v. *Holder*, 574 F.3d 990 (8th Cir. 2009) 10, 14

Manea v. *Mukasey*, 301 Fed. Appx. 589 (9th Cir. 2008) 16

Martin v. *Hadix*, 527 U.S. 343 (1999) 6, 9

Martinez-Murillo v. *Mukasey*, 267 Fed. Appx. 519 (9th Cir. 2008) 17

Matian v. *Mukasey*, 262 Fed. Appx. 753 (9th Cir. 2007) 15

Mbea v. *Gonzales*, 482 F.3d 276 (4th Cir. 2007) 10, 11

Montenegro v. *Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) ... 15

Morgorichev v. *Mukasey*, 274 Fed. Appx. 98 (2d Cir. 2008), cert. denied, 129 S. Ct. 242 (2009) 16

Nadal-Ginard v. *Holder*, 558 F.3d 61 (1st Cir. 2009) 17

Olatunji v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004) 10

Cases—Continued: Page

Ponnapula v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004) 11, 13, 16
Prieto-Romero v. *Mukasey*, 304 Fed. Appx. 512 (9th Cir. 2008) 17
Pugliese v. *Gonzales*, 174 Fed. Appx. 601 (2d Cir. 2006) 16
Quinones-Saucedo v. *Ashcroft*, 83 Fed. Appx. 865 (9th Cir. 2003) 16
Rankine v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003) 10, 13, 16
Raya-Baez v. *INS*, 63 Fed. Appx. 381 (9th Cir. 2003) ... 15
Restrepo v. *McElroy*, 369 F.3d 627 (2d Cir. 2004) 15
Reyes v. *McElroy*, 543 U.S. 1057 (2005) 6
Saravia-Paguada v. *Gonzales*, 488 F.3d 1122 (9th Cir. 2007), cert. denied, 128 S. Ct. 2499 (2008) 15
Serrano-Salcedo v. *Ashcroft*, 56 Fed. Appx. 803 (9th Cir. 2003) 15
Sidhu v. *Gonzales*, 179 Fed. Appx. 221 (5th Cir.), cert. denied, 549 U.S. 993 (2006) 16
Singh v. *Keisler*, 255 Fed. Appx. 710 (4th Cir. 2007) 16
Singh v. *Mukasey*, 520 F.3d 119 (2d Cir. 2008) 16
St. Cyr v. *INS*, 229 F.3d 406 (2d Cir. 2000), aff'd, 533 U.S. 289 (2001) 13
Stephens v. *Ashcroft*, 543 U.S. 1124 (2005) 6
Swaby v. *Ashcroft*, 357 F.3d 156 (2d Cir. 2004) 16
Tecat v. *Gonzales*, 188 Fed. Appx. 308 (5th Cir. 2006) ... 16
Theodoropoulos v. *INS*, 358 F.3d 162 (2d Cir.), cert. denied, 543 U.S. 823 (2004) 16

Cases—Continued: Page

Thom v. *Ashcroft*, 369 F.3d 158 (2d Cir. 2004), cert. denied, 546 U.S. 828 (2005) 16
Thom v. *Gonzales*, 546 U.S. 828 (2005) 6
Trevor v. *Reno*, 88 Fed. Appx. 445 (2d Cir. 2004) 16
United States v. *De Horta Garcia*, 519 F.3d 658 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008) 10, 17
United States v. *Munoz-Recillas*, 224 Fed. Appx. 621 (9th Cir.), cert. denied, 128 S. Ct. 1889 (2007) 16
Walcott v. *Chertoff*, 517 F.3d 149 (2d Cir. 2008) 15
Wilson v. *Gonzales*, 471 F.3d 111 (2d Cir. 2006) 16
Zamora v. *Mukasey*, 128 S. Ct. 2051 (2008) 6

Statutes and regulation:

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277 2
Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597 2
Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*: 2
8 U.S.C. 1101(a)(43)(B) 3
8 U.S.C. 1182(c) (1994) ..... *passim*
8 U.S.C. 1227(a)(2)(A)(iii) 4
8 U.S.C. 1227(a)(2)(B)(i) 4
8 U.S.C. 1229b 2
8 U.S.C. 1229b(a)(3) 3

Regulation—Continued: Page

8 C.F.R. 1212.3(h) 3

Miscellaneous:

Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book* (2009) <http://www.justice.gov/eoir/statspub/fy08syb.pdf> 17

54 Fed. Reg. 47,586 (1989) 18

Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57,826 (2004) 3

In the Supreme Court of the United States

No. 09-263

SANDRA FERGUSON, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 563 F.3d 1254. The orders of the Board of Immigration Appeals (Pet. App. 30a-32a, 35a-38a) and the immigration judge (Pet. App. 33a-34a, 39a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2009. On June 23, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 29, 2009. On July 16, 2009, Justice Thomas further extended the time to August 28, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

Between 1990 and 1996, Congress enacted three statutes that "reduced the size of the class of aliens eligible for" relief under Section 212(c). *St. Cyr*, 533 U.S. at 297. In the Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052, Congress made Section 212(c) unavailable to anyone who had been convicted of an aggravated felony and served a term of imprisonment of at least five years. In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress further amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain criminal offenses, including controlled-substance offenses. See *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b. The latter section now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of an aggravated felony (which, as relevant here, includes a

drug-trafficking crime). See 8 U.S.C. 1101(a)(43)(B), 1229b(a)(3); see also *St. Cyr*, 533 U.S. at 297.

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326. In particular, the Court explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their convictions, they would still have some "likelihood of receiving § 212(c) relief" from deportation. *Id.* at 325.

On September 28, 2004, after notice-and-comment rulemaking proceedings, the Department of Justice promulgated regulations to take account of the decision in *St. Cyr*. See *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for [S]ection 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the regulations, which make aliens ineligible to apply for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h).

2. Petitioner is a native of Jamaica who was admitted to the United States for lawful permanent residence in 1977. Pet. App. 39a; Administrative Record 513 (A.R.). On July 7, 1986, after a trial at which petitioner

pleaded not guilty, the Circuit Court for Cook County, Illinois, found petitioner guilty of the offense of possession with intent to deliver more than thirty grams of a substance containing cocaine, in violation of Illinois law. Pet. App. 39a; A.R. 482-484. On September 9, 1986, petitioner was sentenced to a six-year term of imprisonment, of which she served less than three years. A.R. 67, 484.

On May 19, 1998, the former Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner. A.R. 515-518. A few weeks later, INS filed a superseding Notice to Appear, charging petitioner with being removable for having been convicted of an offense relating to a controlled substance and an aggravated felony drug-trafficking crime. A.R. 513-514; see 8 U.S.C. 1227(a)(2)(B)(i), 1227(a)(2)(A)(iii). On May 18, 1999, an immigration judge found petitioner to be removable under 8 U.S.C. 1227(a)(2)(B)(i), on the basis of her conviction for an offense relating to a controlled substance, and also found her to be ineligible for cancellation of removal or other relief. Pet. App. 40a.

On June 11, 2002, after this Court's decision in *St. Cyr*, the Board of Immigration Appeals (BIA) remanded the case to the immigration judge to determine whether petitioner is eligible for a waiver of removal under former Section 212(c). Pet. App. 37a-38a. On June 1, 2006, after a hearing, the immigration judge pretermitted petitioner's application for a waiver because, unlike the alien in *St. Cyr*, petitioner had gone to trial on her drug offense rather than pleading guilty. *Id.* at 34a. On August 4, 2006, the BIA affirmed the immigration judge's decision and dismissed petitioner's appeal. *Id.* at 30a-32a.

3. The court of appeals denied petitioner's petition for review of the BIA's decision in a published opinion dated March 31, 2009. Pet. App. 1a-29a. After describing what it characterized as a split among the circuits on how to apply *St. Cyr* to aliens who did not plead guilty, *Id.* at 15a-22a, the court held, as a matter of first impression in the circuit, that reliance is relevant to and should be the focus of retroactivity analysis as laid out in *St. Cyr*, even if it is not the only basis for determining whether a statute is impermissibly retroactive. *Id.* at 26a-28a. The court declined to extend *St. Cyr*'s holding, and because petitioner did not plead guilty, was convicted after a trial, and did not identify any other past transactions or considerations for which she had relied on the potential for relief under Section 212(c), the court found that relief under former Section 212(c) is not available. *Id.* at 29a.

ARGUMENT

Petitioner contends (Pet. 22-24) that *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which involved an alien convicted of an aggravated felony after a plea agreement, has been misinterpreted by the majority of the courts of appeals and that the availability of relief under former Section 212(c) of the INA should be extended to any alien found guilty of a deportable offense after a jury trial, because retroactivity analysis should not include any consideration of likely reliance. In the alternative, petitioner contends (Pet. 24-25) that, if reliance is relevant, there need not be a showing of "actual, subjective reliance" because a decision "to go to trial rather than accept [a] plea bargain[]" could have been made "in reasonable reliance on the continuing availability of Section 212(c) relief."

The decision of the court of appeals does not warrant further review because petitioner's arguments lack merit. The courts of appeals have correctly recognized that reliance is a significant factor to be considered for purposes of retroactivity analysis, although it may be given different weight in different circuits and there is some variation about whether the requisite reliance must be actual (as opposed to objectively reasonable) reliance. Furthermore, the underlying question involves the retroactive effect of a statutory repeal that occurred more than 13 years ago, and this Court has denied petitions urging a similar extension of *St. Cyr* in a number of prior cases. See, *e.g.*, *Cruz-Garcia* v. *Holder*, 129 S. Ct. 2424 (2009); *Aguilar* v. *Mukasey*, 128 S. Ct. 2961 (2008); *Zamora* v. *Mukasey*, 128 S. Ct. 2051 (2008); *Hernandez-Castillo* v. *Gonzales*, 549 U.S. 810 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005); *Lawrence* v. *Ashcroft*, 540 U.S. 910 (2003); *Armendariz-Montoya* v. *Sonchik*, 539 U.S. 902 (2003).

1. Petitioner argues (Pet. 22-27) that the decision below conflicts with this Court's retroactivity analysis, and that the court of appeals should not have taken any reliance interest into account in deciding whether the repeal of Section 212(c) applies to aliens in her position. That objection lacks merit. As this Court has explained, in determining whether a statute has a retroactive effect, a court must make a "commonsense, functional judgment" that "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

In *St. Cyr* itself, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because the Court concluded that aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. As the court of appeals below explained, petitioner's contrary view "would render the Supreme Court's reasoning and analytical approach—explained in *St. Cyr*—superfluous by half." Pet. App. 27a.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner relies principally (Pet. 22-25) on two of this Court's retroactivity cases: *Landgraf* and *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997). But petitioner also argues (Pet. 25-27) that the court of appeals' reasoning conflicts with the canon of statutory interpretation, described in *Clark* v. *Martinez*, 543 U.S. 371 (2005), that a single statutory term cannot be construed to have different meanings based on the factual circumstances of the applicant.

Those cases do not support petitioner's arguments. In *Landgraf*, the Court specifically identified "reasonable reliance" as a consideration that "offer[s] sound guidance" in evaluating retroactivity, 511 U.S. at 270, and it quoted that same proposition from *Landgraf* in *St. Cyr*, 533 U.S. at 321, which was decided well after *Hughes Aircraft*. The canon of statutory interpretation in *Clark* is inapplicable to the relevant aspect of this Court's retroactivity analysis. *Clark* interpreted a statutory term. See 543 U.S. at 378. The second step of retroactivity analysis, on the other hand, determines the temporal reach of a statute only when it has been established that the statute contains no provision establishing its retroactivity. See *St. Cyr*, 533 U.S. at 316-317. Where the application of a statute would have retroactive effect, retroactivity analysis may require a court to decline to apply the statute. *Id.* at 316. Conversely, in a case where the same statute would not have retroactive effect, there is no reason not to apply the statute. See *Landgraf*, 511 U.S. at 269-270. Whether a statute's application would have a retroactive effect necessarily depends on "transactions" and "considerations already past" that are associated with a particular case. *Ibid.* (quotation marks omitted). Nothing in *St. Cyr* suggested that any alien who was eligible for Section 212(c) relief before its repeal would remain forever eligible. To the contrary, the Court held that Section "212(c) relief remains available for aliens, *like respondent, whose convictions were obtained through plea agreements* and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326 (emphasis added).

Moreover, the Supreme Court cases petitioner cites predated this Court's most recent decision addressing retroactivity in the immigration context. In *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), the Court explicitly discussed *St. Cyr* and reconfirmed the importance of reliance. In *Fernandez-Vargas*, the Court stated that *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (citations and internal quotation marks omitted). Distinguishing the situation of the alien in *Fernandez-Vargas* from that of the alien in *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

Thus, the court of appeals did not err in considering the prospect of reasonable reliance as part of its "commonsense, functional" judgment about retroactivity. *Martin*, 527 U.S. at 357.

2. Petitioner contends (Pet. 7-20) that this case offers a suitable vehicle to resolve a conflict among the circuits as to the continued availability of relief under former Section 212(c) to aliens who were convicted of crimes before the enactment of AEDPA and IIRIRA. First, this case is a poor vehicle because the court below explicitly "express[ed] no opinion on whether aliens may prove an impermissible retroactive effect by demonstrating reliance on other 'transactions' or 'considerations already past' that do not involve a criminal conviction or the decision to go to trial." Pet. App. 29a n.28.

Second, the disagreement in the analysis of the circuits is narrow. Nine circuits have declined to extend the holding of *St. Cyr* as a general matter to aliens who were convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *Kellermann* v. *Holder*, No. 08-3927, 2010 WL 252264, at *5-*7 (6th Cir. Jan. 25, 2010); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008); *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927, 940 (9th Cir. 2007); *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006); Pet. App. 1a-29a (11th Cir. 2009). Two circuits have held that no showing of reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the BIA from precluding Section 212(c) relief. See *Atkinson* v. *Attorney Gen.*, 479 F.3d 222, 231 (3d Cir. 2007); *Lovan* v. *Holder*, 574 F.3d 990, 994 (8th Cir. 2009) (following *Atkinson* with little further analysis).[1]

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[1] Petitioner cites (Pet. 9) the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004), as rejecting a reliance requirement for retroactivity analysis. The retroactivity issue in *Olatunji*, however, involved the loss of an alien's ability to take brief trips abroad without subjecting himself to removal proceedings, *id.* at 395-396, rather than the loss of access to Section 212(c) relief. *Olatunji* itself distinguished the Fourth Circuit's prior decision in *Chambers* v. *Reno*, 307 F.3d 284 (2002), which involved Section 212(c). See *Olatunji*, 387 F.3d at 392 (discussing *Chambers*, 307 F.3d at 293). As petitioner acknowledges (Pet. 9 n.4), even after *Olatunji*, the Fourth Circuit has—directly contrary to petitioner's argument on the merits—continued to hold that

In *Atkinson*, the Third Circuit retreated from dictum in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004), which had suggested that an alien who had not been offered a guilty plea would be unable to establish reliance for purposes of retroactivity analysis, *id.* at 494. The Third Circuit in *Atkinson* held that the repeal of Section 212(c) should not be construed to apply retroactively to "aliens who, like Atkinson, had not been offered pleas and who had been convicted of aggravated felonies following a jury trial at a time when that conviction would not have rendered them ineligible for [S]ection 212(c) relief."[2] 479 F.3d at 229-230.

The *Atkinson* court's analysis was based on the observation that this Court "has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." 479 F.3d at 227-228. But that result cannot be squared with the rationale of *St. Cyr*, which specifically identified "reasonable reliance" as an important part of the "commonsense, functional judgment" in retroactivity analysis, and then explicitly rested its holding on the assessment that it was likely that aliens who pleaded guilty prior to 1996 had reasonably relied on the possible availability of Section 212(c) relief. See 533 U.S. at 321-323. If the Third Circuit's view that retroactivity analysis turns on the fact of conviction simpliciter were correct, then that entire discussion in *St. Cyr* was superfluous.

"IIRIRA's repeal of § 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial." *Mbea*, 482 F.3d at 281.

[2] The present record does not indicate whether petitioner was offered a plea agreement, and as the court of appeals noted, "aside from her decision to go to trial, [petitioner] points to no other 'transactions' or 'considerations already past' on which she relied." Pet. App. 29a.

Furthermore, the Court's analysis in *St. Cyr* was focused on the prospect of detrimental reliance by an alien who pleaded guilty between 1990, when Congress enacted the bar to Section 212(c) relief for aliens who served more than five years on a sentence for an aggravated felony, and 1996, when Congress repealed Section 212(c) altogether. See *St. Cyr*, 533 U.S. at 293 (describing the facts of St. Cyr's case); *id.* at 297 (describing 1990 enactment); *id.* at 323 (describing circumstances of an alien whose "sole purpose" in plea negotiations was to "ensure" a sentence of less than five years). During that six-year period, an alien concerned about preserving eligibility for relief under Section 212(c) would have had an incentive to enter into a plea agreement that provided for a sentence of five years or less, rather than go to trial and risk a longer (and disqualifying) sentence, and accordingly may have developed reasonable reliance interests. Petitioner, by contrast, was convicted prior to the 1990 amendment. See Pet. App. 39a

In any event, the deviation in the circuits' analysis is narrow, because the Third Circuit nonetheless acknowledged that reliance is "but one consideration." *Atkinson*, 479 F.3d at 231. As a result, its split from the other circuits' analysis extends only to whether a determination of retroactive effect *must* turn on reliance. No circuit has denied that a determination of retroactive effect *may* be based on reliance. As the Seventh Circuit recently noted, "the distinction between [its] analysis" and "that of the Third, Eighth, and Tenth Circuits * * * is one of fine line drawing." *Canto* v. *Holder*, No. 08-4272, 2010 WL 308795, at *5 (Jan. 28, 2010).

3. Petitioner's alternative argument (Pet. 24-25)—that if reliance is a significant factor in evaluating retroactive effect, she could have reasonably relied on the

continued availability of Section 212(c) relief in marking her decision to go to trial rather than plead guilty—is unpersuasive. As the Seventh Circuit recently explained, even though *St. Cyr* recognized that "it is more than likely that those aliens faced with plea agreements contemplated their ability to seek [S]ection 212(c) relief, the same logic cannot necessarily be extended to those aliens convicted at trial" because they did not, as a categorical matter, "forgo any possible benefit in reliance on [S]ection 212(c)." *Canto*, 2010 WL 308785, at *6. And no court has interpreted this Court's retroactivity analysis to find a retroactive effect based on new consequences to *every* prior decision or action. To the contrary, several courts have specifically held that the prior decision to commit a crime is not protected against application of Section 212(c)'s repeal, whether the alien asserted possible reliance on not getting caught, or acquittal at trial, or a sentence that does not bar relief, or the continued availability of relief at all. See *Ponnapula*, 373 F.3d at 495-496 & n.14; *Rankine*, 319 F.3d at 101-102; *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000). Indeed, in the decision that this Court affirmed in *St. Cyr*, the Second Circuit explained that "[i]t would border on the absurd to argue" that aliens "might have decided not to commit" crimes "or might have resisted conviction more vigorously, had then known that if they were not only imprisoned but also * * * ordered deported, they could not ask for a discretionary waiver of deportation." *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2000) (quoting *Jurado-Gutierrez*, 190

F.3d at 1150; in turn quoting *LaGuerre*, 164 F.3d at 1041), aff'd, 533 U.S. 289 (2001). Yet, that is the sort of result to which petitioner's alternative interpretation of retroactive effect would lead.

Petitioner's circumstances in fact are quite distinct from those aliens on whom Section 212(c)'s repeal was held to have a retroactive effect by virtue of reliance that took some form other than a guilty plea. The alien in the Ninth Circuit's decision in *Hernandez de Anderson* took the affirmative step of bringing "herself—and her criminal convictions—to the INS's attention by applying for naturalization," and, in doing so, had relied upon the potential availability of suspension of deportation by waiting to apply for naturalization until she had accrued the ten years of continuous residence that made her eligible for such relief. 497 F.3d at 936-937, 941-943. The alien in the Tenth Circuit's decision in *Hem* made an objectively reasonable decision to forgo a right to an appeal that would have put him "at risk of being sentenced to a sentence longer than 5 years * * * making him ineligible for § 212(c) relief" after 1990. 458 F.3d at 1199.[3]

Petitioner, by contrast, has identified no affirmative act that she committed in possible reliance on the availability of Section 212(c) before its repeal. See Pet. App. 29a. Her suggestion (Pet. 25) that a decision to go to trial rather than plead guilty might, in certain circumstances, have been intended to reduce the risk of a sentence that would bar relief under Section 212(c) is irrelevant to her case, because the five-year-imprisonment

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[3] The aliens in *Atkinson* and *Lovan* were also both convicted after the 1990 narrowing of Section 212(c) relief on the basis of sentence length, on which this Court focused in *St. Cyr*. See p. 12, *supra*; *Atkinson*, 479 F.3d at 224; *Lovan*, 574 F.3d at 992.

ceiling was not added to Section 212(c) until 1990, four years after her conviction. See p. 2, *supra*. Petitioner thus can point to no act or transaction that raises even the prospect of reasonable reliance.

4. Finally, petitioner also cannot avoid the fact that the questions she presents involve the retroactive effect of a statutory repeal that occurred more than 13 years ago. She identifies 57 court of appeals decisions since *St. Cyr* in which she claims "[t]he issue has arisen." Pet. 14 n.6. That list, however, is largely a reflection of the fact that some immigration cases remain pending for a long time. Like this case, at least 40 of the cases petitioner cites involved deportation or removal proceedings that were initiated by the INS before *St. Cyr* was decided in 2001.[4] Among the remaining cases on peti-

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[4] See *Saravia-Paguada* v. *Gonzales*, 488 F.3d 1122, 1124 (9th Cir. 2007) (proceeding began in May 1990), cert. denied, 128 S. Ct. 2499 (2008); *Alvarez-Aceves* v. *Fasano*, 150 Fed. Appx. 596, 597 (9th Cir. 2005) (began in March 1996); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1118 (9th Cir. 2002) (began in April 1996); *Crump* v. *Reno*, 130 Fed. Appx. 500 (2d Cir. 2005) (began in May 1996; based on Gov't C.A. Br., 2005 WL 2614749, at *4); *Walcott* v. *Chertoff*, 517 F.3d 149, 151 (2d Cir. 2008) (began in July 1996); *Matian* v. *Mukasey*, 262 Fed. Appx. 753 (9th Cir. 2007) (began in October 1996; based on Gov't C.A. Br., 2005 WL 5302167); *Restrepo* v. *McElroy*, 369 F.3d 627, 630 (2d Cir. 2004) (began in October 1996); *Raya-Baez* v. *INS*, 63 Fed. Appx. 381 (9th Cir. 2003) (began in November 1996; based on Gov't C.A. Br., 2003 WL 21471673, at *4); *Johnson* v. *Holder*, 564 F.3d 95, 97 (2d Cir. 2009) (began in December 1996), petition for cert. pending, No. 09-7909 (filed Oct. 8, 2009); *Montenegro* v. *Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) (began in January 1997; based on Gov't C.A. Br., 2003 WL 23336264, at *5); *Chambers* v. *Reno*, 307 F.3d 284, 287 (4th Cir. 2002) (began in April 1997); *Serrano-Salcedo* v. *Ashcroft*, 56 Fed. Appx. 803 (9th Cir. 2003) (began in May 1997; based on Pet. C.A. Br., 2002 WL 32112814, at *3); *Lopez-Lopez* v. *Mukasey*, 285 Fed. Appx. 440 (9th Cir. 2008) (began in June 1997; based on Gov't C.A. Br., 2006 WL 2450818, at *4); *Atkinson*

v. *Attorney Gen.*, 479 F.3d 222, 224 (3d Cir. 2007) (began in June 1997); *Singh* v. *Keisler*, 255 Fed. Appx. 710, 712 (4th Cir. 2007) (began in June 1997); *Quinones-Saucedo* v. *Ashcroft*, 83 Fed. Appx. 865 (9th Cir. 2003) (began in August 1997; based on Pet. C.A. Br., 2003 WL 22717151, at *4); *Wilson* v. *Gonzales*, 471 F.3d 111, 113 (2d Cir. 2006) (began in November 1997); *Haque* v. *Holder*, 312 Fed. Appx. 946 (9th Cir. 2009) (began in 1997; based on Gov't C.A. Br., 2006 WL 5211835, at *7); *Morgorichev* v. *Mukasey*, 274 Fed. Appx. 98, 99-100 (2d Cir. 2008) (began in 1997), cert. denied, 129 S. Ct. 2424 (2009); *Carranza-De Salinas* v. *Gonzales*, 477 F.3d 200, 203 (5th Cir. 2007) (began in 1997); *Appel* v. *Gonzales*, 146 Fed. Appx. 175 (9th Cir. 2005) (began in 1997; based on Pet. C.A. Br., 2004 WL 5469141, at *5), cert. denied, 549 U.S. 1051 (2006); *Manea* v. *Mukasey*, 301 Fed. Appx. 589 (9th Cir. 2008) (began before February 1998; based on Pet. C.A. Br., 2008 WL 2647725, at *4); *Pugliese* v. *Gonzales*, 174 Fed. Appx. 601 (2d Cir. 2006) (began in March 1998; based on Gov't C.A. Br., 2005 WL 5166523); *Evangelista* v. *Ashcroft*, 359 F.3d 145, 148 (2d Cir. 2004) (began in April 1998), cert. denied, 543 U.S. 1145 (2005); *Rankine* v. *Reno*, 319 F.3d 93, 96 (2d Cir. 2003) (began in May 1998), cert. denied, 540 U.S. 910 (2003); *Thom* v. *Ashcroft*, 369 F.3d 158, 160 (2d Cir. 2004) (began in June 1998), cert. denied, 546 U.S. 828 (2005); *Garcia* v. *Fasano*, 62 Fed. Appx. 816 (9th Cir. 2003) (began in August 1998; based on Pet. C.A. Br., 2002 WL 32118430, at *3); *Singh* v. *Mukasey*, 520 F.3d 119, 121 (2d Cir. 2008) (began in January 1999); *Tecat* v. *Gonzales*, 188 Fed. Appx. 308 (5th Cir. 2006) (began in March 1999; based on Gov't C.A. Br. at 5 (No. 05-60480)); *Evangelista* v. *Attorney Gen.*, 176 Fed. Appx. 306, 308 (3d Cir. 2006) (began in April 1999); *Kelava* v. *Gonzales*, 434 F.3d 1120 (9th Cir.) (began in June 1999; based on Gov't C.A. Br., 2004 WL 3202731, at *3), cert. denied, 549 U.S. 810 (2006); *Trevor* v. *Reno*, 88 Fed. Appx. 445, 445 (2d Cir. 2004) (necessarily began before order of removal issued in July 1999); *Swaby* v. *Ashcroft*, 357 F.3d 156, 158 (2d Cir. 2004) (began in August 1999); *Theodoropoulos* v. *INS*, 358 F.3d 162, 165 (2d Cir.) (began in September 1999), cert. denied, 543 U.S. 823 (2004); *Berishaj* v. *Gonzales*, 238 Fed. Appx. 275 (9th Cir. 2007) (began in October 1999; based on Pet. C.A. Br., 2006 WL 2983803); *Hem* v. *Maurer*, 458 F.3d 1185, 1187 (10th Cir. 2006) (began in November 1999); *Sidhu* v. *Gonzales*, 179 Fed. Appx. 221, 223 (5th Cir.) (began in 1999), cert. denied, 549 U.S. 993 (2006); *United States* v. *Munoz-Recillas*, 224 Fed. Appx. 621, 623 (9th Cir.) (began in 2000), cert. denied, 128 S. Ct. 189 (2007); *Ponnapula* v.

tioner's list, one involved a post-AEDPA conviction,[5] and only eight involved immigration proceedings that were initiated after 2002.[6]

To be sure, there are other cases already in the pipeline, but the numbers are diminishing. Petitioner's amici cite (at 15) statistics about the frequency with which Section 212(c) relief has been granted in the last several years. That number declined from 1905 grants in FY 2004 to 1049 grants in FY 2008. See Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009) <http://www.justice.gov/eoir/statspub/fy08syb.pdf>. Although the *Statistical Year Book* for FY 2009 has not yet been published, the corresponding number for FY 2009 is expected to be 858 grants—reflecting a 55% decline since

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Ashcroft, 373 F.3d 480, 485 (3d Cir. 2004) (began in October 2000); *Jaw-Shi Wang* v. *Ashcroft*, 71 Fed. Appx. 624 (9th Cir. 2003) (necessarily began before charge of removability was sustained in October 2000; based on Gov't C.A. Br., 2003 WL 21956383, at *3).

[5] *United States* v. *De Horta Garcia*, 519 F.3d 658 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008).

[6] *Cerbacio-Diaz* v. *Gonzales*, 234 Fed. Appx. 583 (9th Cir. 2007) (proceeding began in June 2003; based on Gov't C.A. Br., 2006 WL 4032551, at *7); *Gallardo* v. *Mukasey*, 279 Fed. Appx. 484 (9th Cir. 2008) (began in October 2003; based on Gov't C.A. Br., 2006 WL 2628033, at *4); *Esquivel* v. *Mukasey*, 543 F.3d 919, 920 (7th Cir. 2008) (began in September 2004); *Cruz-Garcia* v. *Mukasey*, 285 Fed. Appx. 446 (9th Cir. 2008) (began in November 2004; based on Gov't C.A. Br., 2007 WL 1225610, at *3), cert. denied, 129 S. Ct. 2424 (2009); *Nadal-Ginard* v. *Holder*, 558 F.3d 61, 64 (1st Cir. 2009) (began in 2004); *Martinez-Murillo* v. *Mukasey*, 267 Fed. Appx. 519 (9th Cir. 2008) (began in January 2005; based on Pet. C.A. Br., 2006 WL 4044532, at *6); *Garcia-Ortiz* v. *Gonzales*, 194 Fed. Appx. 513 (10th Cir. 2006) (began in January 2005; based on Gov't C.A. Br., 2006 WL 6086256, at *4); *Prieto-Romero* v. *Mukasey*, 304 Fed. Appx. 512 (9th Cir. 2008) (began in February 2005; based on Gov't C.A. Br., 2008 WL 486772, at *5).

FY 2004. Similarly, according to other unpublished statistics compiled by the Executive Office of Immigration Review, the number of applications for Section 212(c) relief has fallen dramatically. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2009, there were 576. That reflects a 78% decline since FY 2004—and a 55% decline since FY 2008. Moreover, because most criminal defendants plead guilty, the number of aliens affected by the general rule in the circuits that Section 212(c) does not apply to an alien who was convicted after a trial would be only a small fraction of those numbers.[7]

Thus, there is still every reason to believe that this is an issue of diminishing prospective importance—and one that is already of considerably less current importance than it was when the government sought this Court's review in *St. Cyr* nearly ten years ago. See Pet. 13.

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[7] Petitioner's amici also describe (at 6-11) scenarios in which aliens with pre-1996 convictions may find themselves placed in removal proceedings, including instances when they return from travel abroad, apply for citizenship, or renew their permanent residency or "green" cards. Because green cards issued after 1989 expire after ten years, see 54 Fed. Reg 47,586 (1989), nearly all lawful permanent residents who are removable on the basis of pre-IIRIRA convictions have already been exposed to immigration authorities at some point since 2000—which further shrinks the pool of those who might still have new proceedings initiated against them on the basis of pre-1996 convictions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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154

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Supreme Court of the United States

SANDRA FERGUSON,

Petitioner,

v.

ERIC HOLDER,
ATTORNEY GENERAL OF THE UNITED STATES.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

A. The Conflict Has Expanded Still Further 1

B. The Question Is Frequently Recurring And Of Great Significance. 5

C. Certiorari Is Warranted Because The Court Of Appeals Decision Is Wrong. 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Aguilar v. Mukasey, 128 S. Ct. 2961 (2008) 2

Carachuri-Rosendo v. Holder, 2009 WL 2058154 (Dec. 14, 2009) (No. 09-60) 3

Clark v. Martinez, 543 U.S. 371 (2005) 4, 12

Cruz-Garcia v. *Holder*, 129 S. Ct. 2424 (2009) 2

Dada v. Mukasey, 128 S. Ct. 2307 (2008) 3

Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006) 11

Hernandez De Anderson v. Gonzales, 497 F.3d 927 (9th Cir. 2007) 5

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 6

INS v. St. Cyr, 533 U.S. 289 (2001) ..... *passim*

Kellermann v. Holder, 2010 WL 252264 (6th Cir. Jan. 25, 2010) (No. 08-3927) 1, 4

Kucana v. Holder, 2010 WL 173368 (Jan. 10, 2010) (No. 08-911) 3

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 6, 10

Lovan v. Holder, 574 F.3d 990 (8th Cir. 2009) 2

Nijhawan v. Holder, 129 S. Ct. 2294 (2009) 3

Nken v. Holder, 129 S. Ct. 1749 (2009) 3

Olatunji v. Ashcroft, 387 F.3d 383 (4th Cir. 2004) 5

Zamora v. *Mukasey*, 128 S. Ct. 2051 (2008) 2

Zuluaga Martinez v. INS, 523 F.3d 365 (2d Cir. 2008) 5

Statutes

8 U.S.C. § 1182(c) ..... *passim*

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597 .... 1, 4, 10

Other Authorities

Application Process for Replacing Forms I-551 Without an Expiration Date, 72 Fed. Reg. 46922-01 (Aug. 22, 2007) 8, 9

Exec. Office for Immigration Review, Dep't of Justice, *FY 2008 Statistical Year Book* (2009) 7

Interoffice Memorandum from Michael L. Aytes, Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., to Reg'l, Dist., Field Office and Serv. Ctr. Dirs. And Nat'l Benefits Ctr. Dir. (May 11, 2007) 8

Office of Immigration Statistics, Dep't of Homeland Sec., *Estimates of the Legal Permanent Resident Population in 2008* (2009) 8

Sarah Koteen Barr, *C is for Confusion: The Tortuous Path of Section 212(c) Relief in the Deportation Context*, 12 Lewis & Clark L. Rev. 725 (2008) 7

U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Security, *Fact Sheet: Law Enforcement Support Center* (2009) 9

Rule

8 C.F.R. § 1212.3(h) 4

Judicial Materials

Brief for the United States in Opposition, *Armendariz-Montoya v. Sonchik*, 539 U.S. 902 (2003) (No. 02-1273) 6

Brief for the United States in Opposition, *Carachuri-Rosendo v. Holder*, 2009 WL 2058154 (Nov. 16, 2009) (No. 09-60) 3

Petition for a Writ of Certiorari, *INS v. St. Cyr*, 533 U.S. 289 (2001) (00-767) 4

Reply Brief for the United States, *United States v. O'Brien & Burgess*, No. 08-1569, *cert. granted*, 130 S. Ct. 49 (2009) 3

REPLY BRIEF FOR THE PETITIONER

What is not in dispute is that now eleven courts of appeals – every single court of appeals that regularly decides immigration cases – have created a multi-layered conflict on the question of whether Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-597, applies retroactively to pre-enactment convictions. And even by the government's own measure, that conflict will continue to affect hundreds upon hundreds of aliens for years to come. The government, moreover, does not dispute that this case squarely and cleanly presents the purely legal questions on which the courts of appeals are in intractable conflict. Instead, the government argues that it is perfectly tolerable for hundreds of individuals to be torn away every year from their children, family, and home based on nothing more than accidents of geography or prosecutorial forum choices. In addition, the government disagrees with petitioner on the merits. Neither argument provides a sound basis for denying certiorari.

A. The Conflict Has Expanded Still Further.

The government admits that the circuits are divided four ways over the application of *INS v. St. Cyr*, 533 U.S. 289 (2001), to convictions obtained following an alien's exercise of her Sixth Amendment right to a trial. Pet. 8-12; BIO 6. That conflict, in fact, got even deeper just before the government's response was filed. *See Kellermann v. Holder*, No. 08-3927, 2010 WL 252264, at *6-7 (6th Cir. Jan. 25, 2010). That decision, moreover, marked the second

expansion of the conflict since the court of appeals' decision in this case. *See Lovan v. Holder*, 574 F.3d 990, 993-994 (8th Cir. 2009). The problem thus is getting worse, not going away as the government contends.

Given that, the government's claims that such extreme and entirely arbitrary variation in life-altering consequences should be tolerated in perpetuity lack merit.

1. The government stresses (BIO 6) that certiorari has been denied before. True enough. But circumstances and the clear presentation of the question have changed. *See* Pet. 20-22. All but three of the petitions the government cites were denied before the circuit conflict arose in earnest in 2007, and thus before the depth and frequently recurring nature of the problem was clear. *See* BIO 6; Pet. 19-20. Moreover, in each of the three post-2007 petitions, the government argued that the question was not cleanly posed by the facts of the case.[1] They do not argue that here. And in two of those cases, the government urged the Court to delay review in light of a recent BIA regulation.[2] The government has now abandoned that contention, and for good reason, *see* Pet. 20.

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[1] *See* BIO 10-11 (citing *Cruz-Garcia* v. *Holder*, 129 S. Ct. 2424 (2009)); BIO 7 (citing *Aguilar v. Mukasey*, 128 S. Ct. 2961 (2008)); BIO 7-9 (citing *Zamora* v. *Mukasey*, 128 S. Ct. 2051 (2008)).

[2] *See* BIO 10 (citing *Aguilar, supra*); BIO 14 (citing *Zamora, supra*).

More importantly, this is the first petition since the Eighth Circuit joined the Third in holding that Section 212(c) relief is categorically available to individuals like petitioner convicted after trial. *See* Pet. 8-9. The case thus warrants certiorari for exactly the reasons the government itself has told this Court (and with which this Court apparently agreed): "When the [Third] Circuit stood alone in its view, there was a reasonable chance that it would reconsider, perhaps in light of the * * * additional circuits that later came to disagree with it. Now, though, the [Eighth] Circuit has joined the [Third] Circuit * * * with a full view of the split; the chance that the [Third] and [Eighth] Circuits will both realign their views is remote." U.S. Pet. Reply, *United States v. O'Brien & Burgess*, No. 08-1569, at 3, *cert. granted*, 130 S. Ct. 49 (2009).

2. The government argues (BIO 10) that the conflict is "narrow." But the 2-4-5 conflict is now broader, more fractured, and more deeply entrenched than almost any other immigration case in which this Court has granted certiorari in recent memory. *See, e.g.*, *Carachuri-Rosendo v. Holder*, 2009 WL 2058154 (Dec. 14, 2009) (No. 09-60) (granting petition to address 4-2 split);[3] *Kucana v. Holder*, 2010 WL 173368, *5 & n.7 (Jan. 10, 2010) (No. 08-911) (resolving 1-6 split); *Nijhawan v. Holder*, 129 S. Ct. 2294, 2298 (2009) (3-3 split); *Nken v. Holder*, 129 S. Ct. 1749, 1755 (2009) (2-7 split); *Dada v. Mukasey*, 128 S. Ct. 2307, 2312 (2008) (4-3 split).

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[3] *See* U.S. BIO, *Carachuri-Rosendo*, at 14.

More importantly, there is nothing "narrow" about a conflict in which fully half of the circuits deciding the question have rejected the *government's* own interpretation of the statute as set out in the Board of Immigration Appeals' regulations. *Compare* 8 C.F.R. § 1212.3(h) (categorical exclusion), *with* Pet. 8-11 (five circuits hold that relief is either always, or sometimes, available).

Indeed, when the circuits initially divided just 3-1 on the retroactivity of Section 212(c)'s repeal, it was the government that insisted this Court's certiorari review was warranted, emphasizing the need for uniformity and the importance of the question. *See* U.S. Pet. 28-29, *St. Cyr*, *supra*. The government offers no explanation for its sudden disinterest in the uniform and evenhanded treatment of thousands of identically situated aliens.

3. The impact of the conflict is not remotely narrow either. Had petitioner's case arisen in the Third or Eighth Circuits, instead of the Eleventh, she would be entitled to apply for relief and – the government does not dispute – very likely would have received it and been allowed to remain here in the Country in which she has lived for a quarter century with her U.S. citizen children and other family members, *see* Pet. 21. Likewise, individuals who can show actual or objectively reasonable reliance are entitled to apply for waivers in four circuits but are precluded from any possibility of relief in five others. Pet. 10-12; *Kellermann*, *supra*. That profound difference in outcomes is not because the statute requires it – nothing in the text invites such disparate operation. IIRIRA Section 304(b) has one meaning and one meaning only. *See Clark v.*

Martinez, 543 U.S. 371, 378 (2005). Instead, lawyers must advise their clients that the sole reason for their bar on relief and consequent deportation is geographical misfortune. That is neither right nor properly tolerated.

B. The Question Is Frequently Recurring And Of Great Significance.

Unable to dispute the breadth and depth of the circuit conflict, the government insists (BIO 15-18) that at some unspecified time in the future, the problem will go away. That makes no sense. The argument presumes that the courts of appeals have developed a special rule of retroactivity analysis confined to this one immigration law problem, and that they will abandon their widely divergent rules of retroactivity analysis and drop their repeated calls for this Court's guidance (*see* Pet. 16-18) when pre-IIRIRA Section 212(c) claims stop. That is not how binding circuit precedent works. In fact, the confusion is expanding, not retracting, as courts of appeals have expressly decried even outside the Section 212(c) relief context the "substantial confusion * * * throughout the Courts of Appeals" in retroactivity law, *Olatunji v. Ashcroft*, 387 F.3d 383, 390 (4th Cir. 2004), and the "considerable disagreement" in retroactivity law, *Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 938 (9th Cir. 2007), which is subject to "much debate," *Zuluaga Martinez v. INS*, 523 F.3d 365, 386 (2d Cir. 2008) (Straub, J., concurring). Thus, while the broad conflict that has arisen concerning Section 212(c) merits this Court's review in its own right, the conflict it documents in the courts of appeals' retroactivity law and the need for this Court's

correction is far deeper and enduring than this particular immigration context.

In any event, even this particular question of immigration law will likely not go away in our lifetimes, which should be more than sufficient to warrant certiorari. What the government's argument overlooks is that the retroactivity question here is far more enduring than in almost every other context. In *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the retroactivity question was confined to cases pending at the time of enactment. In others, like *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), statutes of limitations have cabined the reach of laws imposing consequences on pre-enactment conduct.

Not so here. There is no statute of limitations – none – on removal for long-past offenses. That is why the government provides the Court with no end date for the dramatic divergence in removal standards it asks this Court to tolerate. Indeed, although the government has been predicting for seven years that the stream of cases would subside,[4] the government now acknowledges (BIO 15) that nearly sixty court of appeals cases have raised the question.

That is just the beginning. As the government itself explains (BIO 15), those cases represent only the first wave of litigation to have worked its way through the system. *See ibid.* (noting that, because "some immigration cases remain pending for a long

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[4] *See, e.g.*, U.S. BIO 15, *Armendariz-Montoya v. Sonchik*, 539 U.S. 902 (2003) (No. 02-1273).

time," most of the reported decisions arose from proceedings commenced prior to 2001). Even if the government never again attempted to remove another person with a pre-1997 conviction, there would still be nine years' worth of cases in the pipeline.

The government, however, points (BIO 17-18) to a decrease in the number of Section 212(c) applications and grants, comparing numbers from 2004 and 2008. But those same statistics show that decreases can be short-lived, and that the number of grants fluctuates from year to year. Indeed, between 2005 and 2006, there was a 33% increase in the grant of Section 212(c) relief. *See* Exec. Office for Immigration Review, Dep't of Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009), *available at* http://www.justice.gov/eoir/statspub/fy08syb.pdf. [5]

In any event, the government offers no reason why a rule that continues to affect hundreds, if not thousands, of aliens thirteen years after *St. Cyr* is insufficient to warrant this Court's review. At the current rate, it will be another *fifteen years* before the number of granted waivers falls below 75 per year. *See* BIO 17-18 (describing 55% decline in five years,

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[5] The recent decline in applications and grants is likely due in large part to other developments in the Bureau of Immigration Appeals' interpretation of Section 212(c). *See* Sarah Koteen Barr, *C is for Confusion: The Tortuous Path of Section 212(c) Relief in the Deportation Context*, 12 Lewis & Clark L. Rev. 725 (2008).

resulting in current grant of 858 applications in FY2009).

The government also cites a renewal obligation for aliens given green cards after 1989 (BIO 18 n.7). But even assuming the government had conducted criminal background checks as part of that renewal process – something the government does not claim occurred[6] – there are more than *three million* lawful permanent residents who first obtained their status prior to 1990 and therefore have not had to renew their green cards.[7] And that group may soon swell the pool of aliens affected by the circuit conflict, because the Department of Homeland Security has issued proposed rules that would require lawful permanent residents issued non-expiring green cards to apply for renewable cards. *See Application Process for Replacing Forms I-551 Without an Expiration Date*, 72 Fed. Reg. 46922-01 (Aug. 22, 2007). Among other things, the new regulation is designed to allow the government to conduct background checks on applicants and identify individuals subject to removal

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[6] It appears that systematic fingerprint checks were not begun until 2006. *See* Interoffice Memorandum from Michael L. Aytes, Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., to Reg'l, Dist., Field Office and Serv. Ctr. Dirs. And Nat'l Benefits Ctr. Dir. (May 11, 2007), *available at* http://www.uscis.gov/files/pressrelease/I90EPSNS051107.pdf.

[7] *See* Office of Immigration Statistics, Dep't of Homeland Sec., *Estimates of the Legal Permanent Resident Population in 2008* Table 3 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2008.pdf.

for, *inter alia*, committing crimes in the past. *Id.* at 46923-46924.

Nor does the government provide any answer to the showing that other recent developments will likely lead to an increase in proceedings against individuals with pre-1997 convictions in the coming years. *See* Pet. 16; Amici Br. 7-13. Indeed, the government itself has explained that it is now receiving a record number of referrals from local law enforcement agencies.[8] Of particular significance, the government's "Secured Communities" program is expected to increase by *ten-fold* the number of individuals identified for removal based on recent arrests when it is fully implemented in 2013. *See* Amici Br. at 11.

Finally, the passage of time magnifies, rather than diminishes, the importance of the questions presented. As time goes by, those affected have increasingly stronger claims to Section 212(c) relief. At the same time, the considerations counseling against retroactivity grow more acute. Petitioner and many others like her made decisions based on the pre-IIRIRA state of the law decades ago, paid their debts to society, and went on to live many years as law-abiding, productive members of their communities. Had the government responded promptly to their initial convictions, individuals like petitioner would have been entitled to apply for

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[8] *See also, e.g.*, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Security, *Fact Sheet: Law Enforcement Support Center* (2009), *available at* http://www.ice.gov/doclib/pi/news/factsheets/lesc.pdf.

Section 212(c) waivers, and many would have received them. But the government delayed, even while those affected matured, started families, paid their taxes, and developed reasonable expectations that they had put their past transgressions behind them.

C. Certiorari Is Warranted Because The Court of Appeals Decision Is Wrong.

Unsurprisingly, the government and petitioner disagree on the merits of the retroactivity question. BIO 12-15. That is a commonplace in cases meriting this Court's review, not a reason to deny review of a conflict of this breadth and frequency of recurrence. Right or wrong, IIRIRA Section 304(b) should have one meaning.

In any event, the government is incorrect to argue (BIO 12-15) that, as a matter of law, aliens could not have reasonably relied on the continuing availability of Section 212(c) waivers in deciding whether to commit the crime or to go to trial. *St. Cyr* itself made clear that the retroactivity of a statutory provision does not turn on any single factor, such as reliance. *See, e.g., St. Cyr*, 533 U.S. at 321 & n.46. What is most critical, if not dispositive, is whether the statute "attaches new legal consequences to events completed before its enactment," *Landgraf*, 511 U.S. at 270, even if the underlying conduct was itself previously unlawful, *id.* at 282 n.35. And courts must assume that Congress did not mean to create that unfairness, unless it clearly expresses a contrary intent. *See, e.g., Landgraf, supra.*

The government does not dispute that the repeal of Section 212(c) attaches new legal consequences to petitioner's pre-enactment conviction. In *St. Cyr*, the

Court explained that the difference between "facing possible deportation and facing certain deportation" was of critical retroactivity significance, and that the repeal of Section 212(c) was comparable to the repeal of an affirmative defense or the imposition of a mandatory minimum sentence, both of which the Court has held to have retroactive effect. 533 U.S. at 325.

The Government nonetheless insists (BIO 7) that this Court narrowed the traditional retroactivity inquiry in *St. Cyr*. But the Court's discussion of reasonable reliance in *St. Cyr* simply shows that it can sometimes be a sufficient ground for finding retroactive effect, not that it is indispensable. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006), is no help to the government either. The Court, in fact, reiterated that statutes have retroactive effect if they "increase a party's liability for past conduct." *Id.* at 37 (citation omitted). The Court in that case simply concluded that the principle was not implicated because the statute in question was triggered by the immigrant's post-enactment decision to stay in the country rather than his pre-enactment unlawful entry. *Id.* at 42-43.

Beyond that, reasonable reliance exists in this context. As petitioner has explained, and the government has ignored (*see* BIO 13-15), an immigrant could reasonably believe that going to trial (with the possibility of avoiding a conviction for a deportable offense) would be the best way to prevent deportation, knowing that the downside risk was limited by the availability of Section 212(c) relief. *See* Pet. 25.

Furthermore, as the government itself explained in *St. Cyr*, Section 212(c) "makes no distinctions at all based on whether an alien has pleaded guilty or not guilty." U.S. Br. 47. "There is therefore no basis in the statute for distinguishing, as the court of appeals did, between aliens who pleaded guilty and those who did not, in determining whether the repeal of Section 1182(c) would contravene the presumption against retroactivity." *Ibid.* *Clark v. Martinez*, 543 U.S. 371 (2005), has proved the accuracy of that argument. To draw the utterly atextual distinction the government favors in Section 212(c)'s text "would be to invent a statute rather than interpret one." *Clark*, 543 U.S. at 378.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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142

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In The
Supreme Court of the United States

SANDRA FERGUSON,

Petitioner,

v.

ERIC HOLDER, ATTORNEY GENERAL
OF THE UNITED STATES,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
Interests of the *Amici Curiae*	1
Summary of the Argument	3
Reasons for Granting the Writ	6
I. Increasingly Pervasive Methods Of Immigration Enforcement Will Continue To Lead To Removal Proceedings Against Individuals With Pre-1996 Criminal Convictions	6
A. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings After Return To The United States From Travel Abroad	7
B. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings After Applying For United States Citizenship	8
C. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings After Renewing Their Green Cards	10
D. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings Because Of Increased Communication Between Local Law Enforcement And Immigration Authorities	11

TABLE OF CONTENTS – Continued

Page

E. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings Because Of ICE's Practice Of Carrying Out Raids 12

II. Eligibility For § 212(c) Relief Remains Critical For Lawful Permanent Residents Placed In Removal Proceedings Based On Old Convictions 13

III. Availability Of § 212(c) To Lawful Permanent Residents With Old Convictions Is Arbitrarily Determined Because The Government May Commence Removal Proceedings In Any Circuit 21

IV. Even If Reliance Were A Critical Factor In The Retroactivity Analysis, The Eleventh Circuit Erred Because Immigrants Who Decide To Go To Trial, Just As Those Who Plead Guilty, Rely On The Relief Available At The Time 22

Conclusion 26

TABLE OF AUTHORITIES

Page

CASES

Amendariz-Montoya v. Sonchik, 291 F.3d 1116 (9th Cir. 2002) 17

Esquivel v. Mukasey, 543 F.3d 919 (7th Cir. 2007) 17

Garcia v. Shanahan, 615 F. Supp. 2d 175 (S.D.N.Y. 2009) 12

Hem v. Maurer, 458 F.3d 1185 (10th Cir. 2006) 17

In re Yanez-Garcia, 23 I. & N. Dec. 390 (BIA 2002) 21

INS v. St. Cyr, 533 U.S. 289 (2001) .....*passim*

Kelava v. Gonzales, 434 F.3d 1120 (9th Cir. 2006) 9

Lovan v. Holder, 574 F.3d 990 (8th Cir. 2009).....9, 16

Matter of Marin, 16 I. & N. Dec. 581 (BIA 1978) 4, 14, 18, 19

Mbea v. Gonzales, 482 F.3d 276 (4th Cir. 2007).....8

Molina-De La Villa v. Mukasey, 306 F. App'x 389 (9th Cir. 2009) 8, 18

Nadal-Ginard v. Holder, 558 F.3d 61 (1st Cir. 2009) 8

Perriello v. Napolitano, No. 05-2868, 2009 U.S. App. LEXIS 19595 (2d Cir. Sept. 1, 2009)....8, 16, 17

Ponnapula v. Ashcroft, 235 F. Supp. 2d 397 (M.D. Pa. 2002) 24, 25

TABLE OF AUTHORITIES – Continued

Page

Ponnapula v. Ashcroft, 373 F.3d 480 (3d Cir. 2004) 16, 21, 25

Saravia-Paguada v. Gonzales, 488 F.3d 1122 (9th Cir. 2007) 16

Wilson v. Gonzales, 471 F.3d 111 (2d Cir. 2006) 17, 21

Zamora v. Gonzales, 240 F. App'x 150 (7th Cir. 2007) 8, 16, 17

Zuluaga Martinez v. INS, 523 F.3d 365 (2d Cir. 2008) 16

STATUTES AND REGULATIONS

8 U.S.C. § 1182(c) (1994) 23

8 U.S.C. § 1229b (2006) 15, 16

8 U.S.C. § 1251(a)(2)(A)(i) (1994) 23

8 U.S.C. § 1251(a)(2)(B)(i) (1994) 23

8 U.S.C. § 1304(e) (2006) 10

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 23

8 C.F.R. § 1.1(p) (2009) 10

8 C.F.R. § 103.2(e) (2009) 8

8 C.F.R. § 1212.3(f)(4)(ii) (2009) 23

TABLE OF AUTHORITIES – Continued

Page

JUDICIAL MATERIALS

Brief of Petitioner-Appellant, *Appel v. Gonzales*, 146 F. App'x 175 (9th Cir. 2005) (No. 03-56986) 17

Brief of Petitioner-Appellant, *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2007) (No. 00-6364) 16, 17

Brief of Petitioner-Appellant, *Gallardo v. Mukasey*, 279 F. App'x 484 (9th Cir. 2008) (No. 05-76739) 16

Brief of Petitioner-Appellant, *Haque v. Holder*, 312 F. App'x 946 (9th Cir. 2009) (Nos. 05-74825, 06-71433) 16, 17

Brief of Petitioner-Appellant, *Manzo-Garcia v. Gonzales*, 225 F. App'x 631 (9th Cir. 2007) (No. 05-72660) 17

Brief of Petitioner-Appellant, *Martinez-Murillo v. Mukasey*, 267 F. App'x 519 (9th Cir. 2008) (No. 06-73562) 11, 16

Brief of Petitioner-Appellant, *Molina-De La Villa v. Mukasey*, 306 F. App'x 389 (9th Cir. 2009) (Nos. 04-71033, 05-74126) 16, 17, 18

Brief of Petitioner-Appellant, *Prieto-Romero v. Mukasey*, 304 F. App'x 512 (9th Cir. 2008) (No. 07-35458) 17, 18

Brief of Petitioner-Appellant, *Walcott v. Chertoff*, 517 F.3d 149 (2d Cir. 2008) (No. 06-5516-ag) 17

TABLE OF AUTHORITIES – Continued

Page

Brief for the Respondent in Opposition, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008) (No. 07-820) 7

Petition for Writ of Certiorari, *Ferguson v. Holder*, No. 09-263 (Aug. 28, 2009) 22

Certified Administrative Record, *Ferguson v. Att'y Gen.*, No. 08-10806-G (A35 730 532) (Mar. 31, 2008) ..... *passim*

OTHER AUTHORITIES

American Civil Liberties Union, *Prolonged Immigration Detention of Individuals Who Are Challenging Removal* 3 (2008), http://www.aclu.org/images/asset_upload_file766_40474.pdf 18

Emily Bazar, *Some Travelers Criticize Border Patrol Inspection Methods*, USA Today, Sept. 30, 2008, http://www.usatoday.com/news/nation/2008-09-30-border-patrol-inside_N.htm 12

Nina Bernstein, *Immigration Officials Often Detain Foreign-Born Rikers Inmates for Deportation*, N.Y. Times, Aug. 24, 2009, at A17 12

Nina Bernstein, *Immigrant Workers Caught in Net Cast for Gangs*, N.Y. Times, Nov. 25, 2007, at sec. 1, p. 41 12

Editorial, *The Shame of Postville, Iowa*, N.Y. Times, July 13, 2008, at WK11 12

TABLE OF AUTHORITIES – Continued

Page

Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2008 Statistical Year Book R3 (2009), http://www.usdoj.gov/eoir/statspub/syb2000main.htm 15

Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 71.01 (2009) 6

Spencer S. Hsu, *U.S. to Expand Immigration Checks to all Local Jails*, Wash. Post, May 19, 2009, at A1 12

Immigration & Customs Enforcement, U.S. Dep't of Homeland Security, *Secure Communities Fact Sheet* (2009), http://www.ice.gov/doclib/pi/news/factsheets/secure_communities.pdf 11

Immigration & Naturalization Serv., U.S. Dep't of Justice, HQOPP 50/4, Memorandum to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel, *Exercising Prosecutorial Discretion* (2000), *reprinted in* 5 Bender's Immigration Bulletin 995 (Dec. 1, 2000) 7

Migration Policy Inst., *Behind the Naturalization Backlog: Causes, Contexts, and Concerns* 1 (2008), http://www.migrationpolicy.org/pubs/FS21_NaturalizationBacklog_022608.pdf 9

TABLE OF AUTHORITIES – Continued

Page

U.S. Dep't of Homeland Security, Office of Immigration Statistics, Population Estimates, *Estimates of the Legal Permanent Resident Population in 2007* 3 (2009), http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_pe_2007.pdf.....9

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are organizations that provide legal services to immigrants and advise defense attorneys whose clients could face deportation. This case involves the deep and growing split among the courts of appeals over the continued availability of a critical form of equitable relief from deportation for lawful permanent residents (LPRs) with pre-1996 convictions. As organizations concerned with the proper and consistent understanding of the immigration consequences of criminal convictions, *amici* urge the Court to grant certiorari in this case to resolve this important issue.

The **Immigrant Defense Project** (IDP) provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. This Court has accepted and relied on amicus curiae briefs submitted by IDP in cases involving the proper application of federal immigration law to immigrants with past criminal adjudications, including this Court's recent decisions in *Lopez v. Gonzales*, 549

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[1] The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court, in accordance with Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

U.S. 47 (2006), *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *INS v. St. Cyr*, 533 U.S. 289 (2001).

The **Immigrant Legal Resource Center** (ILRC) is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal adjudications.

The **National Immigration Project of the National Lawyers Guild** (NIP) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. NIP provides legal training to the bar and the bench on the immigration consequences of criminal conduct and is the author of Immigration Law and Crimes and three other treatises published by Thomson-West. NIP has participated as amicus curiae in several significant immigration-related cases before this Court.

The **National Association of Criminal Defense Lawyers** (NACDL) is a non-profit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public

defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper and efficient administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations.

SUMMARY OF THE ARGUMENT

Under former § 212(c) of the Immigration and Nationality Act, lawful permanent residents (LPRs) with criminal convictions could seek relief from deportation on the basis of equitable factors and strong ties to the United States. In *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court held that applying the repeal of § 212(c) to LPRs convicted before its enactment had an impermissible retroactive effect. The courts of appeals are now deeply divided over whether applying the repeal of § 212(c) to LPRs who, prior to 1996, were convicted *after a decision to go to trial* would result in an impermissible retroactive effect, just as it does for LPRs who pled guilty before 1996. The continued availability of § 212(c) relief remains critical for thousands of individuals and

their families. *Amici* urge this Court to grant certiorari in the present case for the following four reasons.

First, because no statute of limitations restricts when the government can commence removal proceedings based on criminal convictions, LPRs with pre-1996 convictions will continue to be put into removal proceedings, and cases involving § 212(c) relief will emerge for years to come. As the present case demonstrates, the government can initiate removal proceedings long after an LPR has re-established a productive life following a conviction. Furthermore, the government's systems for initiating removal proceedings against immigrants with potentially-deportable offenses are becoming increasingly expansive. LPRs with pre-1996 convictions may find themselves in removal proceedings after returning from brief trips abroad, applying for naturalization, or renewing their permanent residency cards. Additionally, the integration of databases and increased communication with local law enforcement raises the likelihood that LPRs with old convictions will end up in removal proceedings.

Second, in addition to being of utmost importance to affected immigrants and their families, § 212(c) ensures that immigration judges can exercise discretion under well-established standards designed to promote "the best interests of this country." *Matter of Marin*, 16 I. & N. Dec. 581, 584 (BIA 1978). The individuals impacted by the retroactive application of the repeal of § 212(c) are all long-time LPRs with

convictions that are *at least* 13 years old. As Sandra Ferguson, the petitioner in this case, illustrates, these LPRs often have substantial ties to the United States, such as strong employment records, community involvement, and family ties, including United States citizen spouses, children, and other family members.

Third, because the government can commence removal proceedings in any circuit, the circuit split at issue creates inconsistent application of the law to similarly situated individuals. The Department of Homeland Security's (DHS) practice of transferring immigrant detainees far from their place of residence for removal proceedings leads to arbitrary differences in eligibility for relief under § 212(c). Individuals are transferred to jurisdictions that apply different rules than the jurisdictions in which they reside or where their convictions took place. Similarly, after traveling abroad, LPRs may be placed in removal proceedings based upon their port of entry to the United States, which may not be where they reside.

Fourth, as our experience counseling immigrant defendants and defense attorneys indicates, there is no justification for distinguishing between LPRs who pled guilty and those who were convicted after a trial, as the Eleventh Circuit has done. While *amici* believe that the opinion below gives too much weight to reliance in the retroactivity analysis, even if this Court concludes that reliance is a necessary factor, the Eleventh Circuit's opinion is flawed. Both the decision to plead guilty and the decision to go to trial

require an LPR to consider the impact on her immigration status and rely upon the relief available at the time. Thus, the retroactive application of the repeal of § 212(c) relief disrupts equally the reasonable expectations of an immigrant who is convicted at trial as those of an immigrant who accepted a plea agreement prior to 1996.

For these reasons, *amici* request that this Court grant certiorari to resolve the critical issue in this case.

REASONS FOR GRANTING THE WRIT

I. INCREASINGLY PERVASIVE METHODS OF IMMIGRATION ENFORCEMENT WILL CONTINUE TO LEAD TO REMOVAL PROCEEDINGS AGAINST INDIVIDUALS WITH PRE-1996 CRIMINAL CONVICTIONS.

Because no statute of limitations restricts when the government may commence removal proceedings based on potentially deportable criminal convictions, an LPR with a prior conviction may face removal proceedings at any point during her lifetime.[2] This possibility becomes a reality in routine situations, such as when immigrants travel, apply for naturalization, or seek renewals of identification. In

[2] *See* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 71.01 (2009).

addition, immigration authorities' increasingly widespread enforcement efforts and communication with local law enforcement lead to removal proceedings against LPRs with old convictions. Accordingly, contrary to the government's assertion in previous cases,[3] the question presented by the petition will continue to recur for a long time to come.

A. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings After Return To The United States From Travel Abroad.

LPRs with pre-1996 convictions are placed into removal proceedings upon returning to the United States from trips abroad. Returning LPRs are screened by DHS officials for previous convictions. Because DHS believes it cannot exercise discretion when screening individuals for admission to the United States,[4] LPRs find themselves facing deportation because of decades-old convictions.

Savario Perriello, for example, was returning from a brief trip to Italy in 2000 when immigration authorities charged him with inadmissibility and

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[3] *E.g.*, Brief for the Respondent in Opposition at 13, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008) (No. 07-820).

[4] *See* Immigration & Naturalization Serv., U.S. Dep't of Justice, HQOPP 50/4, Memorandum to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel, *Exercising Prosecutorial Discretion* (2000), *reprinted in* 5 Bender's Immigration Bulletin 995 (Dec. 1, 2000).

initiated proceedings. Mr. Perriello, an LPR, had resided in the United States since 1961, when he was 13 years old. In the 23 years between his conviction by trial and the initiation of proceedings, Mr. Perriello married a United States citizen, operated a restaurant, and raised four United States citizen children. He was denied § 212(c) relief because his past conviction was by trial.[5]

B. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings After Applying For United States Citizenship.

Second, LPRs applying for citizenship are put into removal proceedings after disclosing prior convictions on naturalization applications. Applicants for naturalization must disclose prior convictions and undergo fingerprint checks. [6] If an applicant has a deportable conviction, United States Citizenship and Immigration Services (USCIS) can refer that individual to Immigration and Customs Enforcement (ICE) for removal proceedings. In 2007, there were

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[5] *Perriello v. Napolitano*, No. 05-2868, 2009 U.S. App. LEXIS 19595, at *3 (2d Cir. Sept. 1, 2009). *See also Nadal-Ginard v. Holder*, 558 F.3d 61, 64 (1st Cir. 2009) (longtime LPR placed into proceedings after brief trip abroad); *Mbea v. Gonzales*, 482 F.3d 276, 278 (4th Cir. 2007) (same); *Zamora v. Gonzales*, 240 F. App'x 150, 151 (7th Cir. 2007) (same); *Molina-De La Villa v. Mukasey*, 306 F. App'x 389, 391 (9th Cir. 2009) (same).

[6] 8 C.F.R. § 103.2(e) (2009).

almost 1.4 million applications for naturalization filed, nearly twice as many applications as the previous year.[7] Still, an estimated additional 8.2 million LPRs are eligible to naturalize.[8] Any of these LPRs with an old conviction faces removal proceedings when he or she seeks to naturalize.

Chanh Lovan, for instance, came to the United States as a refugee from Laos in 1981 and later became an LPR. In 2002, Mr. Lovan applied for naturalization, 11 years after his trial conviction. Mr. Lovan's application was denied and he was placed into removal proceedings, threatening to tear him away from his United States citizen wife and children. The government argued that he should be denied a § 212(c) hearing because he took his case to trial.[9]

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[7] Migration Policy Inst., *Behind the Naturalization Backlog: Causes, Contexts, and Concerns* 1 (2008), http://www.migrationpolicy.org/pubs/FS21_NaturalizationBacklog_022608.pdf.

[8] U.S. Dep't of Homeland Security, Office of Immigration Statistics, Population Estimates, *Estimates of the Legal Permanent Resident Population in 2007* 3 (2009), http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_pe_2007.pdf

[9] *Lovan v. Holder*, 574 F.3d 990, 992 (8th Cir. 2009). *See also Kelava v. Gonzales*, 434 F.3d 1120, 1122 (9th Cir. 2006) (longtime LPR placed into proceedings after applying for citizenship).

C. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings After Renewing Their Green Cards.

Third, LPRs may end up in removal proceedings after renewing their permanent residency cards, commonly known as "green cards." LPRs require a green card to return to the United States after traveling abroad. Many LPRs need a green card to prove work eligibility. Additionally, LPRs are required by law to carry proof of their immigration status at all times.[10] Because individuals applying for green card renewal are fingerprinted as part of the process, the renewal process can result in LPRs with old convictions being placed in removal proceedings.

Gerardo Martinez-Murillo, for example, applied for a replacement green card in 2004. Shortly thereafter, immigration authorities placed Mr. Martinez-Murillo into proceedings based on his 1992 conviction by trial. Mr. Martinez-Murillo came to the United States as a child. When he was placed in removal proceedings, he had lived here for 30 years with his mother and eleven siblings, one of whom was a member of the United States military. He was

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[10] 8 U.S.C. § 1304(e) (2006). However, an expired green card has no effect on a person's lawful status. 8 C.F.R. § 1.1(p) (2009).

denied a hearing under § 212(c) because his conviction was by trial.[11]

D. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings Because Of Increased Communication Between Local Law Enforcement and Immigration Authorities.

Moreover, in addition to these standard practices that often result in removal proceedings, increased communication between local law enforcement and immigration authorities and the integration of informational databases is likely to result in even more widespread mechanisms for identifying individuals with old convictions. A new program called Secure Communities, for example, is designed to have all jails run fingerprints against immigration databases,[12] and pass matches along to ICE. ICE predicts nationwide expansion of Secure Communities by the year 2013.[13] Government officials predict this initiative will increase tenfold the numbers of individuals

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[11] Brief of Petitioner-Appellant at 5-6, *Martinez-Murillo v. Mukasey*, 267 F. App'x 519 (9th Cir. 2008) (No. 06-73562).

[12] Immigration & Customs Enforcement, U.S. Dep't of Homeland Security, *Secure Communities Fact Sheet* (2009), http://www.ice.gov/doclib/pi/news/factsheets/secure_communities.pdf.

[13] *Id.*

identified for deportation.[14] Similar programs operate out of local prisons, where ICE has offices.[15] These programs have been used to place LPRs with old criminal convictions in removal proceedings. *See e.g.*, *Garcia v. Shanahan*, 615 F. Supp. 2d 175 (S.D.N.Y. 2009).

E. Lawful Permanent Residents With Old Convictions Are Placed In Removal Proceedings Because Of ICE's Practice Of Carrying Out Raids.

Other methods of expanding enforcement include home raids,[16] raids on Amtrak trains and Greyhound buses,[17] and workplace raids.[18] The petitioner in this case, Sandra Ferguson, illustrates how workplace raids can sweep up those authorized to work in the United States. Immigration agents visited her workplace searching for an individual suspected of

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[14] Spencer S. Hsu, *U.S. to Expand Immigration Checks to all Local Jails*, Wash. Post, May 19, 2009, at A1.

[15] Many correctional facilities also provide office space to ICE to interview suspected non-citizens. Nina Bernstein, *Immigration Officials Often Detain Foreign-Born Rikers Inmates for Deportation*, N.Y. Times, Aug. 24, 2009, at A17.

[16] Nina Bernstein, *Immigrant Workers Caught in Net Cast for Gangs*, N.Y. Times, Nov. 25, 2007, at sec. 1, p. 41.

[17] Emily Bazar, *Some Travelers Criticize Border Patrol Inspection Methods*, USA Today, Sept. 30, 2008, http://www.usatoday.com/news/nation/2008-09-30-border-patrol-inside_N.htm.

[18] Editorial, *The Shame of Postville, Iowa*, N.Y. Times, July 13, 2008, at WK11.

working without authorization. (R. at 351-53.) Although Ms. Ferguson was authorized to work, immigration agents questioned her, leading to the initiation of her removal proceedings. (R. at 351-52.)

Such enforcement methods, combined with the lack of a statute of limitations, means LPRs with pre-1996 convictions will inevitably, and increasingly, come to the attention of immigration authorities. Because of this issue's importance to the affected individuals, it will continue to be litigated at the administrative agency level and in lower courts. Until this Court clarifies whether § 212(c) relief was retroactively repealed for LPRs convicted after trial, the courts of appeals will continue receiving petitions for review, and the Supreme Court will continue receiving petitions for certiorari.

II. ELIGIBILITY FOR § 212(c) RELIEF REMAINS CRITICAL FOR LAWFUL PERMANENT RESIDENTS PLACED IN REMOVAL PROCEEDINGS BASED ON OLD CONVICTIONS.

The continued availability of § 212(c) relief and the opportunity to present one's equities is of utmost importance to LPRs with pre-1996 convictions as well as to their families and communities. For LPRs applying for § 212(c) relief, the opportunity to present their equities means the difference between "facing possible deportation and facing certain deportation." *INS v. St. Cyr*, 533 U.S. 289, 325 (2001).

To obtain § 212(c) relief, an LPR must show that favorable considerations outweigh adverse factors such as criminal records, violations of immigration laws, or indications of bad character. *Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (BIA 1978). Such relevant favorable considerations include:

> family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of business ties, evidence of value and service to the community, proof of genuine rehabilitation if criminal record exists, and other evidence attesting to a respondent's good character.

Id. at 584-85. Immigration judges are allowed to grant § 212(c) relief when the balance of factors promotes "the best interests of this country." *Id.* at 584.

The equities of LPRs affected by the question presented in this case will be especially strong because only those convicted before 1996 are at issue. Thus, their convictions will be *at least* 13 years old. Some have convictions that are decades old. Most of these LPRs served their sentences long ago and have since rehabilitated themselves. The deep roots these LPRs have established and their contributions to

their communities make them strong candidates for equitable relief.

Although § 212(c) was repealed 13 years ago, statistical evidence illustrates its continued importance. Ms. Ferguson is but one of many LPRs put into removal proceedings annually based on an old conviction who could benefit from § 212(c) relief. Immigration judges still hear thousands of applications for § 212(c) relief every year[19] and, historically, the rate of granting § 212(c) relief has been very high.[20] In the past five years, for example, tens of thousands of LPRs have been granted equitable relief from removal, and § 212(c) waivers constituted a *full third* of the equitable relief granted to LPRs in that time period.[21]

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[19] *See* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2008 Statistical Year Book R3 (2009), http://www.usdoj.gov/eoir/statspub/syb2000main.htm [hereinafter FY 2008 Statistical Year Book].

[20] An LPR applying for § 212(c) relief had a greater than 50% chance that relief would be granted. *See St. Cyr*, 533 U.S. at 296 n.5. Considering that immigration judges grant § 212(c) relief in over a thousand cases a year, it is likely that somewhere between two and three thousand § 212(c) cases come before immigration judges annually.

[21] The remaining two thirds of grants of equitable relief to LPRs during the last five years were in the form of "cancellation of removal." *See* FY 2008 Statistical Year Book, *supra* note 18, at R3. Congress replaced § 212(c) relief with cancellation in IIRIRA. LPRs convicted of any aggravated felony – even if they served no jail time – are ineligible for cancellation. 8 U.S.C. § 1229b (2006). In addition, LPRs must meet a seven-year

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Recent circuit court cases demonstrate that LPRs with pre-1996 convictions by jury trial often have strong equities. The continued availability of § 212(c) relief remains critical for these individuals. Cases involving LPRs convicted by trial include LPRs with strong family ties to the United States, such as United States citizen children, spouses, parents, siblings, grand-parents, aunts, uncles, and friends;[22]

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continuous residence requirement. *Id.* For LPRs with old convictions, however, some courts have held that the clock stopped when they committed a deportable offense even if that offense was long before the passage of IIRIRA. *See e.g.*, *Zuluaga Martinez v. INS*, 523 F.3d 365 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1314 (2009).

[22] *See e.g.*, *Perriello v. Napolitano*, No. 05-2868, 2009 U.S. App. LEXIS 19595, at *3 (2d Cir. Sept. 1, 2009) (U.S. citizen wife and four U.S. citizen children); *Ponnapula v. Ashcroft*, 373 F.3d 480, 485 (3d Cir. 2004) (U.S. citizen wife, two children, and brothers); Brief of Petitioner-Appellant at 5, *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2007) (No. 00-6364) (U.S. citizen mother and grandmother); *Zamora v. Gonzales*, 240 F. App'x 150, 151 (7th Cir. 2007) (two U.S. citizen children and two U.S. citizen grandchildren); *Lovan v. Holder*, 574 F.3d 990, 992 (8th Cir. 2009) (U.S. citizen wife and children); Brief of Petitioner-Appellant at 7, *Molina-De La Villa v. Mukasey*, 306 F. App'x 389 (9th Cir. 2009) (Nos. 04-71033, 05-74126) (U.S. citizen wife and three children); Brief of Petitioner-Appellant at 2, *Gallardo v. Mukasey*, 279 F. App'x 484 (9th Cir. 2008) (No. 05-76739) (wife, two children, and five grandchildren are U.S. citizens); Brief of Petitioner-Appellant at 5, *Martinez-Murillo v. Mukasey*, 267 F. App'x 519 (9th Cir. 2008) (No. 06-73562) (twelve siblings in lawful status); *Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1124 (9th Cir. 2007) (U.S. citizen child and mother and siblings with LPR status); Brief of Petitioner-Appellant at 5, *Haque v. Holder*, 312 F. App'x 946 (9th Cir. 2009) (Nos. 05-74825, 06-71433) (U.S. citizen parents and seven U.S. citizen siblings);

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LPRs who have lived almost their entire lives in the United States;[23] LPRs with strong employment records;[24] LPRs who are successful small business owners and employ others in their communities;[25]

Brief of Petitioner-Appellant at 7, *Prieto-Romero v. Mukasey*, 304 F. App'x 512 (9th Cir. 2008) (No. 07-35458) (two U.S. citizen children).

[23] *See e.g.*, Brief of Petitioner-Appellant at 3, *Walcott v. Chertoff*, 517 F.3d 149 (2d Cir. 2008) (No. 06-5516-ag) (became an LPR at age 11); *Hem v. Maurer*, 458 F.3d 1185, 1187 (10th Cir. 2006) (entered U.S. at age 7); *Wilson v. Gonzales*, 471 F.3d 111, 113 (2d Cir. 2006) (entered as an LPR at age 4); *Esquivel v. Mukasey*, 543 F.3d 919, 920 (7th Cir. 2007) (entered U.S. at age 6); Brief of Petitioner-Appellant at 2, *Chambers*, 307 F.3d 284 (No. 00-6364) (entered U.S. at age 2); Brief of Petitioner-Appellant at 4, *Manzo-Garcia v. Gonzales*, 225 F. App'x 631 (9th Cir. 2007) (No. 05-72660) (entered U.S. at a very young age); *Amendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118 (9th Cir. 2002) (entered U.S. at age 3).

[24] *See e.g.*, Brief of Petitioner-Appellant at 6, *Prieto-Romero*, 304 F. App'x 512 (No. 07-35458) (worked fourteen years as a counselor for the State of Oregon Department of Human Services and nine years at a second job at Northwest Human Services); *Zamora*, 240 F. App'x at 151 (worked as a machinist since 1989); Brief of Petitioner-Appellant at 7, *Molina-De La Villa*, 306 F. App'x 389 (Nos. 04-71033, 05-74126) (immigrant was family's primary breadwinner).

[25] *See e.g.*, *Perriello*, 2009 U.S. App. LEXIS at *3 (operates restaurant in New York); Brief of Petitioner-Appellant at 3, *Appel v. Gonzales*, 146 F. App'x 175 (9th Cir. 2005) (No. 03-56986) (owns a business with assets more than one million dollars, employs 20 people, and contracts with an additional 40 people); Brief of Petitioner-Appellant at 5, *Haque*, 312 F. App'x 946 (Nos. 05-74825, 06-71433) (owned and ran two carwashes, earned over $100,000 per year, and employed approximately 70 employees).

LPRs who are very involved with their churches and faith communities[26] and who participate in community service;[27] and LPRs who served in the United States military.[28] All these individuals will be ineligible for § 212(c) relief if the repeal is applied to their old convictions solely because they took their cases to trial.

Ms. Ferguson's case demonstrates the equities presented by LPRs with old convictions. From her testimony at a § 212(c) hearing on February 2, 2006, it is clear that Ms. Ferguson has made a strong case for an award of relief under § 212(c).[29]

Ms. Ferguson has substantial family ties in the United States. *See Matter of Marin*, 16 I. & N. Dec. at 584. Her entire family lives in the United States, including her three American-born children, as well

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[26] *See e.g.*, Brief of Petitioner-Appellant at 7, *Molina-De La Villa*, 306 F. App'x 389 (Nos. 04-71033, 05-74126) (immigrant is active member of his church community).

[27] *See e.g.*, Brief of Petitioner-Appellant at 6, *Prieto-Romero*, 304 F. App'x 512 (No. 07-35458) (works as an on-call shelter worker at the Homeless Outreach and Advocacy Project).

[28] The petitioner in *Molina-De La Villa v. Mukasey*, 306 F. App'x 389 (9th Cir. 2009), was a former serviceman in the U.S. Navy. American Civil Liberties Union, *Prolonged Immigration Detention of Individuals Who Are Challenging Removal* 3 (2008), http://www.aclu.org/images/asset_upload_file766_40474.pdf.

[29] Initially, the government conceded Ms. Ferguson's § 212(c) eligibility, and the immigration judge scheduled a hearing to evaluate her § 212(c) application. (R. at 67-68.) At that hearing, Ms. Ferguson took the stand to answer questions about her conviction and her equities.

as her mother, three brothers, two sisters, three aunts, and great grandmother, most of whom are also United States citizens. (R. at 98.) She has lived in the United States for the vast majority of her life, having entered as an LPR at the age of 13 in 1977, and has only returned to Jamaica once for a brief trip. (R. at 83-84.)

Ms. Ferguson showed evidence of a strong employment history. *See Matter of Marin*, 16 I. & N. Dec. at 585. Ms. Ferguson has worked consistently since 1993 (R. at 226), and she has been employed as a certified nursing assistant and a medical assistant since 2002 (R. at 98). In her words, her duties include "[taking] care of elderly patients . . . [providing] love and comfort to them in their home[s] on a daily basis." (R. at 96.) She has never received welfare assistance and has always paid her taxes. (R. at 97.)

Beyond her employment record, Ms. Ferguson also produced additional "evidence of value and service to the community." *See Matter of Marin*, 16 I. & N. Dec. at 585. She volunteers at a food pantry where she distributes food to the needy and attends church twice a week with her children. (R. at 102.) Moreover, she has never had any subsequent convictions since her single 21-year-old drug conviction. (R. at 80-81.)

She also established that her family, particularly her children, would suffer hardship in the event of her deportation. *See Matter of Marin*, 16 I. & N. Dec. at 585. Two years ago, at the time of the hearing, her sons were sixteen, ten, and five years old. (R. at 93.)

Ms. Ferguson raised her three sons as a single mother and only received child support for her eldest son. (R. at 100.) Under Ms. Ferguson's care, her sons have flourished at school and have built strong social ties to the United States. (R. at 101, 156, 192-93.) Accompanying their mother to Jamaica would be a traumatic experience: her sons have no friends or family in Jamaica, and only the eldest son has ever even visited the country. (R. at 101.)

Indeed, Ms. Ferguson's equities are so strong that the immigration judge in her case believed § 212(c) relief was warranted. Immigration Judge Pedro Miranda noted that Ms. Ferguson is a "long-time person" with "a very old conviction" and that "hopefully there will be something" to indicate her § 212(c) eligibility. (R. at 131.) Yet, based on the fact that Ms. Ferguson was convicted by trial rather than by plea, the immigration judge felt bound to grant the government's motion to pretermit her application for § 212(c) relief. (R. at 126.) This Court should grant certiorari in the present case so that Ms. Ferguson and other similarly-situated LPRs who were convicted at trial can present their equities for § 212(c) relief just as this Court, in *St. Cyr*, allowed LPRs convicted by plea to do.

III. AVAILABILITY OF § 212(C) TO LAWFUL PERMANENT RESIDENTS WITH OLD CONVICTIONS IS ARBITRARILY DETERMINED BECAUSE THE GOVERNMENT MAY COMMENCE REMOVAL PROCEEDINGS IN ANY CIRCUIT.

DHS subjects individuals facing removal proceedings to detention in the location of the government's choosing without regard to where the individual resides or where the conviction occurred. Also, an LPR returning to the United States from a brief trip overseas may be placed into removal proceedings based on where she was inspected by immigration authorities, irrespective of whether this place of entry is in fact where she resides.

Because immigration judges apply the law of the circuit in which they sit,[30] the law applied in any one case depends on arbitrary facts, such as where the person is detained or where the person entered the country after a trip. This arbitrary application frustrates the expectations of immigrants and their lawyers.[31] Transfers of LPRs for removal proceedings will continue to play a role in the enforcement of

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[30] *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 394-96 (BIA 2002).

[31] *See, e.g.*, *Wilson v. Gonzales*, 471 F.3d 111, 114 (2d Cir. 2006) (New York resident transferred to immigration detention in Louisiana); *Ponnapula v. Ashcroft*, 373 F.3d 480, 485 (3d Cir. 2004) (New York resident transferred to immigration detention in Pennsylvania).

immigration laws, and so the confusion and unpredictability created by the present circuit split will remain a problem for a large number of LPRs with old convictions.

IV. EVEN IF RELIANCE WERE A CRITICAL FACTOR IN THE RETROACTIVITY ANALYSIS, THE ELEVENTH CIRCUIT ERRED BECAUSE IMMIGRANTS WHO DECIDE TO GO TO TRIAL, JUST AS THOSE WHO PLEAD GUILTY, RELY ON THE RELIEF AVAILABLE AT THE TIME.

As our extensive experience counseling immigrant defendants indicates, immigrants who chose to go to trial – like those who pled guilty – often relied on the availability of § 212(c) relief when making the decision. Demonstrable reliance is only one of several factors in the retroactivity analysis,[32] but even if it were essential, the Eleventh Circuit erroneously concluded that LPRs who went to trial before 1996 did not rely on the availability of § 212(c) relief.

Prior to IIRIRA, a variety of scenarios existed in which a defendant could choose to stand trial for a deportable offense while preserving § 212(c) eligibility. Before 1996, an LPR was ineligible for § 212(c)

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[32] As the Petitioner in this case points out, the Eleventh Circuit places excessive weight on reliance in the retroactivity analysis. Petition for Writ of Certiorari at 22-24, *Ferguson v. Holder*, No. 09-263 (Aug. 28, 2009).

relief only if she (1) had been convicted of an "aggravated felony," *and* (2) had *served* five or more years in prison.[33] 8 U.S.C. § 1182(c) (1994) (emphasis added). Many deportable offenses were not classified as "aggravated felonies."[34] Consequently, an immigrant could go to trial for a deportable offense and still maintain § 212(c) eligibility. Furthermore, an LPR could be charged with an aggravated felony that did not carry, or probably would not result in, a sentence of more than five years. Indeed, because the five-year ban was only enacted in the Immigration Act of 1990, someone convicted before then, such as Ms. Ferguson, could have maintained § 212(c) eligibility even if she served more than five years.[35] In these cases prior to IIRIRA, and with even more certainty prior to the Immigration Act of 1990, we could and often did counsel the immigrant defendant that the conviction and sentence received at trial would probably not affect her right to seek § 212(c) relief.

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[33] This five-year bar was enacted in the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, effective November 29, 1990.

[34] *See, e.g.*, 8 U.S.C. § 1251(a)(2)(A)(i) (1994) (crimes of "moral turpitude"); 8 U.S.C. § 1251(a)(2)(B)(i) (1994) ("controlled substances" violations).

[35] The regulations provide that a person remains eligible for § 212(c) relief, even if she served a sentence of five or more years, if the conviction was entered by guilty plea before November 29, 1990. 8 C.F.R. § 1212.3(f)(4)(ii) (2009).

Many LPRs relied on our advice that going to trial would not hurt their eligibility for § 212(c) relief and, thus, decided to stand trial. In cases where the immigrant defendant was informed, either by her lawyer or the court, that a conviction would probably not endanger § 212(c) eligibility, the decision to go to trial depended on considerations such as length of a potential sentence, belief in her innocence, and the strength of the government's case. Indeed, in our experience, cases in which defendants choose to stand trial tend to be the cases in which the prosecution's evidence of guilt is the weakest. Even when the prosecution's evidence is weak, however, a defendant who knows that conviction could foreclose deportation relief will often choose to plead to charges that carry less risk of deportation.

Murali Ponnapula's case, which our experience indicates is typical, demonstrates how immigrant defendants who chose trial still relied on the availability of § 212(c) relief. After Mr. Ponnapula was indicted for two felony charges, the District Attorney's office offered him a plea to a misdemeanor with a probationary sentence. Mr. Ponnapula's counsel advised him that, if convicted after trial, he would likely receive a sentence of less than five years, and so he would still be eligible for § 212(c) relief. Relying on that information, Mr. Ponnapula turned down the plea offer and went to trial. *Ponnapula v. Ashcroft*, 235 F. Supp. 2d 397, 399 (M.D. Pa. 2002). As the Third Circuit noted in upholding the district court's finding that IIRIRA's repeal of § 212(c) should

not apply retroactively to individuals such as Mr. Ponnapula, "[t]he advice of Ponnapula's counsel, and his reliance thereon, is easily understandable, for the evidence at trial barely established criminality." *Ponnapula v. Ashcroft*, 373 F.3d 480, 484 (3d Cir. 2004).

Although Mr. Ponnapula was convicted at trial, his counsel's advice on sentencing proved correct: he was sentenced to no more than three years. As the District Court explained, "[Mr. Ponnapula] conformed his conduct – his decision to go to trial, rather than plead guilty – to his settled expectation that discretionary relief would be available in the event he were convicted." *Ponnapula*, 235 F. Supp. 2d at 405. It is hard to imagine he would have turned down the plea offer if he had known that going to trial posed the risk of *mandatory* deportation.

Immigrant defendants such as Mr. Ponnapula, who are facing the possibility of deportation, make the decision whether to go to trial or to enter a plea, and if so, to what offense, with the utmost care. *See INS v. St. Cyr*, 533 U.S. 289, 322 (2001). Our experience indicates, and courts have confirmed, that "[a] defendant who goes to trial believing that his opportunity to seek § 212(c) relief is secure, is as equally disrupted in his reasonable and settled expectations as is a defendant who accepts a plea believing it to confer such a benefit." *Ponnapula*, 235 F. Supp. 2d at 404.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the petition for the writ of certiorari should be granted.

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New York, NY

Respectfully submitted,

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